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THE

WHOLE PROCEEDINGS

IN THE CASE OF

OLMSTED AND OTHERS

VERSUS

RITTENHOUSE'S EXECUTRICES,

As contained in documents on record in the courts of the United States and Pennsylvania;

TOGETHER WITH

The Act of the Legislature of the State of Pennsylvania and other matters in relation to this important subject.

COLLECTED AND ARRANGED BY
RICHARD PETERS, JUN.

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PREFACE.

THE collection of documents now presented to the public has no other claims to their attention but those which are derived from the importance of the case they faithfully represent. The purpose of the editor has been confined entirely to the publication of matters of record; and he has endeavoured so to arrange them as to exhibit, in succession, a complete view of the subject from its origin to the present period.

It would have afforded him the highest satisfaction could he have been enabled to record the amicable termination of a controversy which threatens to disturb the peace and invade the constitution of the United States. The State of Pennsylvania has been twice disgraced by opposition to the federal government, to an extent which required military force to check and disperse it. But both these instances of hostility to the laws of the union were to be ascribed to the ignorance of those engaged in them rather than to other causes. The case to which the attention of the

public is now directed can claim no apology of this character. This opposition has its sanction from the highest authorities of the state, and obtained support from a gentleman who formerly held its highest judicial station, and the duration of whose services in the first executive office had no limit but that which was imposed by the constitution.

Should a collision take place between the authority of the United States and the State of Pennsylvania, and consequences endangering or fatal to our peace or to the union ensue, every man will wish to possess the collection now published; and in a matter which so deeply involves the interests of each individual among us, he will desire to judge for himself and to decide from documents. But should the wisdom and justice of our legislature induce them to abandon the position taken in 1803 and still retained, the editor ventures to encourage a hope that this publication may still have some interest with the politician, the lawyer and the statesman.

March 1809.

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THE WHOLE PROCEEDINGS, &c.

IN

THE CASE

OF

Olmsted, et al. *v.* Rittenhouse's Ex'rs.

ON the 25th November, 1775, after reciting various acts of war on the part of Great Britain against her colonies, congress passed the following resolutions:

1. That all such ships of war, frigates, sloops, cutters, and armed vessels, as are or shall be, employed in the present cruel and unjust war against the united colonies, and shall fall into the hands of, or be taken by the inhabitants thereof, be seized and forfeited to and for the purposes herein after mentioned.

2. That all transport vessels in the same service, having on board any troops, arms, ammunition, clothing, provisions, or military, or naval stores of what kind soever, and all vessels to whomsoever belonging, that shall be employed in carrying provisions or other necessaries to the British army or armies, or navy, that now are or shall hereafter be within any of the united colonies, or any goods, wares, or merchandise for the use of such fleet or army, shall be liable to seizure, and with their cargoes shall be confiscated.

4. That it be and is hereby recommended to the several legislatures in the united colonies as soon as possible to erect courts of justice, or give jurisdiction to the courts now in being for the purpose of determining concerning the cap-

tures to be made as aforesaid, and to provide that all trials in such case be had by a jury under such qualifications, as to the respective legislatures shall seem expedient.

5. That all prosecutions shall be commenced in the court of that colony in which the captures shall be made; but if no such court be at that time erected in the said colony, or if the capture be made on open sea, then the prosecution shall be in the court of such colony as the captor may find most convenient, provided that nothing contained in this resolution shall be construed so as to enable the captor to remove his prize from any colony competent to determine concerning the seizure, after he shall have carried the vessel so seized within any harbour of the same.

6. That in all cases an appeal shall be allowed to the congress, or such person or persons as they shall appoint for the trial of appeals, provided the appeal be demanded within five days after definitive sentence, and such appeal be lodged with the secretary of congress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect, and in case of the death of the secretary during the recess of congress, then the said appeal to be lodged in congress within twenty days after the meeting thereof.

7. That when any vessel or vessels shall be fitted out at the expense of any private person or persons, then the captures made, shall be to the use of the owner or owners of the said vessel or vessels; that where the vessels employed in the capture shall be fitted out at the expense of any of the united colonies, then one third of the prize taken shall be to the use of the captors, and the remaining two thirds to the use of the said colony; and where the vessels so employed shall be fitted out at the continental charge, then one third shall go to the captors, and the remaining two thirds to the use of the

united colonies, provided nevertheless, that if the capture be a vessel of war, then the captors shall be entitled to one half of the value, and the remainder shall go to the colony or continent as the case may be, the necessary charges of condemnation of all prizes, being deducted before distribution made.*

In consequence of these resolutions, the legislature of Pennsylvania, on the 9th day of September, 1778, passed an act for establishing a court of admiralty,† and by the 6th and 7th sections of that act, provided,

"That the judge of admiralty (in cases brought before him by libel) issue his warrant to the marshal of the court of admiralty, commanding him to summon and return a jury, who shall be sworn or affirmed, to return and give a true verdict, upon the libel according to evidence; and the finding of the jury shall establish the facts, without reexamination or appeal.

The 7th section provides, "that in all cases of captures an appeal from the decree of the judge of admiralty of this state shall be allowed to the continental congress or such person or persons as they may from time to time appoint, for hearing and trying appeals. Provided the appeal be demanded within three days after definitive sentence; and such appeal be lodged with the secretary of congress within thirty days afterwards; and provided that the party appealing shall become bound before the said judge of admiralty, in such sum as he in his discretion may think proper, as security to prosecute the appeal to effect, &c."

Under this act of assembly the following proceedings were commenced and prosecuted in the court of admiralty, before

* Journals of Congress, vol. 1, page 260.

† Acts of the General Assembly of the Commonwealth of Pennsylvania, vol. 1, page 154.

George Ross, esquire, who was appointed judge of that court.

Thomas Houston, esquire, qui tam.
v.
The sloop Active, &c.

To the honourable George Ross, esquire, judge of the court of admiralty, for the port of Philadelphia, in the state or commonwealth of Pennsylvania.

The bill of Thomas Houston, esquire, commander of the brigantine of war, called the Convention, in the state aforesaid, which said Thomas Houston, in this behalf prosecuteth, as well for himself and the officers, mariners and seamen, belonging to the said brigantine, as for the said state, in all humble manner showeth:

That the said brigantine was equipped, victualled, fitted out, armed and manned by the state aforesaid, and the said Thomas Houston duly commissioned and appointed by the supreme executive council of the said state or commonwealth, to command the said brigantine; and that the said Thomas Houston being so commissioned and appointed, with his officers, mariners and seamen, on board the said brigantine, sailing upon the high seas, between the twentieth day of August and the day of exhibiting this bill in the present year upon the high seas and within the jurisdiction of this court, did discover, pursue, apprehend and as legal prize and booty of war, take the sloop or vessel called the Active, commanded by John Underwood, burthen about ninety tons, with her tackle, apparel, furniture, and cargo, the property of, or belonging to some subject or subjects of the king of Great Britain and not residing in or being an inhabitant or inhabitants of the Bermudas, Providence, or Bahama islands or to some other enemy or enemies of these United States. And the said Thomas Houston, doth further charge and show, that the

said sloop, at the time of her said capture and before, was employed in conveying supplies to and for the use of the fleet, or army of the king of Great Britain, then within the said United States.

Wherefore, the said Thomas Houston prays this honourable court that the said sloop or vessel called the Active, with her tackle, apparel, furniture, and cargo, may be condemned and adjudged, forfeited to the use of the captors thereof, and the state aforesaid according to the resolutions of the honourable congress of the United States aforesaid, and the act of assembly of this state, in such case and for such purposes lately made and provided, &c.

JONATHAN D. SERGEANT,
proc. for libellant.

September 14th, 1778.

To the honourable George Ross, esquire, judge of the court of admiralty, lately instituted for the port of Philadelphia, in the state of Pennsylvania, by the resolves of the assembly of the said state, in pursuance of the resolves of the honourable the continental congress.

The claim of James Josiah, commander of the privateer sloop, called Le Gerard, belonging to and fitted out by divers persons, inhabitants of the state of Pennsylvania, in behalf of himself, the owners, the officers, mariners, seamen, and all others concerned in or belonging to the said sloop Le Gerard, to the bill of Thomas Houston, commander of the armed brigantine called the Convention, in the service of the thirteen United States of America, &c. who as well, &c.

In all humble manner showeth to your honour,

That the said privateer sloop was equipped, fitted out, victualled and manned by divers persons inhabitants of the state of Pennsylvania aforesaid, and that the said James Josiah was duly commissioned authorized and licensed by

the delegates of the said United States in congress assembled, to command the said privateer sloop Le Gerard, and to cruise against and to make captures of all vessels belonging to the enemies of the said United States of America. And being so commissioned, authorized and licensed, he the said James Josiah, with his officers mariners and seamen, on board the said sloop called Le Gerard, did cruise upon the high seas; and on Sunday the sixth day of September last past, did fall in with and speak the aforesaid brigantine called the convention, the above named Thomas Houston being commander, when it was mutually proposed and consented to, that the said two vessels should cruise in concert; in consequence of which mutual agreement, signals in the night time for the government of their conduct were appointed, in order to prevent them from separating or losing sight of each other; that in pursuance of, and in conformity with, such mutual agreement, they continued in company until Tuesday the eighth day of September then next ensuing; at which time at eleven of the clock of the morning of the same day, they the said James Josiah, and divers other persons on board the said sloop Le Gerard, did see the said brigantine called the Convention off the decks standing to the eastward, and immediately after saw a sloop to the southeast standing in shore to the westward; in consequence of which, they immediately gave chase to the said sloop, and at half an hour past eleven o'clock in the morning of the same day, did see the said brigantine and sloop heave to, they being then at the distance of about four or five miles; and that in a little time after, the said brigantine and sloop made sail towards Cape May, they still continuing the chase; that at the hour of twelve o'clock of the same day, they set all the sail they could in pursuit of the said brigantine and sloop; and at half an hour past four o'clock in the afternoon of the same day,

the said sloop Le Gerard came to an anchor within Cape May road, within the distance of a mile of the said brigantine and sloop, the said brigantine and sloop still standing up the bay. This claimant in all humble manner further showeth to your honour that the said sloop so captured by the said brigantine called the Convention in concert with the said sloop Le Gerard, was and is the sloop called the Active, John Underwood commander, the property of and belonging to the inhabitant or inhabitants of the island of Great Britain, or to some person or persons under the protection of or owing allegiance to the king thereof, and is the sloop mentioned in the bill of the said Thomas Houston—that the said sloop, Le Gerard, as well by reason of her having been in concert with the said brigantine Convention, as by reason of having been in sight of the said sloop called the Active, when she struck to the said brigantine, is entitled to her proportionable part of the prize money arising from the sale of the said sloop called the Active; and her cargo, tackle, apparel and furniture, according to the number of men and guns on board the said sloop Le Gerard agreeable to the resolves of the honourable the delegates of the thirteen United States in congress assembled. And the said James Josiah also prays that this his claim may be received, and thereupon he will exhibit proofs in support of the allegations herein contained at such time and place as this honourable court may think proper to appoint, &c.

JAMES JOSIAH.

In the Admiralty.
Pennsylvania ss.

To the honourable George Ross, esquire, judge of the court of admiralty for the port of Philadelphia in the state of Pennsylvania.

The claim and answer of Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke late mariners of and belonging to the sloop or vessel called the Active, to the libel filed in this cause by Thomas Houston commander of the armed brigantine of war called the Convention, against the said sloop or vessel called the Active, her tackle, apparel, furniture and cargo.

The said Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke, now and at all times, hereafter reserving and saving to themselves the benefit and advantage of excepting to the informalities and unsufficiencies, in the said bill contained for answer thereto, nevertheless say that they are natives and inhabitants of the United States of America, and as such were taken and made prisoners of war upon the high seas, on or about the fifteenth day of June last, by the subjects and armed forces of his Britannic majesty, then and still being the open and declared enemies of the said states; that after the said capture they these claimants were taken by the subjects and armed forces of the said king, as prisoners of war, to the island of Jamaica within the dominions of the same king, and there put and shipped by the same enemies on board the sloop or vessel called the Active, as mariners and seamen, for the purpose of navigating and conducting the same sloop or vessel from the island aforesaid, to the port of New York, then in possession of the troops of his said Britannic majesty, and for the further purpose of being detained and confined as prisoners of war at New York after their arrival there; that afterwards to wit,

on or about the first day of August last, they, these claimants, sailed as mariners and seamen on board the said sloop from the island aforesaid for the said port of New York; and on or about the sixth day of September last, then being prisoners of war, seamen and mariners on board the said sloop or vessel on the high seas, and within the jurisdiction of this honourable court, and the said sloop or vessel then being actually on her way and making a voyage to the said port of New York, with goods, wares and merchandise on board of her for the use of the navy and army of the said king within these states, they, these claimants, with the intent and purpose of preventing the said goods, wares and merchandise, from being furnished and supplied to the navy and army aforesaid and with the further intent view and purpose of escaping from their captivity and bondage, and from the power and possession of the said enemy and returning with the said sloop or vessel and the goods, wares, and merchandise aforesaid on board her to the said United States, and their fellow subjects on the day and year last aforesaid, in the northern latitude of 38° 10, did rise in a warlike manner on board the said sloop or vessel, upon John Underwood who was then captain and commander thereof, and by superior force and military knowledge did then and there confine as prisoners of war, and secure and absolutely subject to their will and power in the cabin of the said sloop the said captain or master thereof, and also his mate together with three passengers namely, Robert Jackson, John Holmes and Andrew Anderson, and all other persons making or attemping any resistance; and in the said cabin did then and there fasten and deprive of liberty the same several persons, and did also then and there take possession of and assume and take upon themselves the sole and absolute command and control of the said sloop or vessel called the Active, and with the same

sloop or vessel called the Active, her tackle, apparel, furniture and cargo, and with the said captain, mate, passengers, and other persons aforesaid subjected and reduced to the will, power and government of them, these claimants, to wit, the said Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke, they did proceed and make the best of their way for and towards Egg-Harbour in the state of New Jersey, with intent to make the same. And they, these claimants, do aver and say that afterwards to wit, on the eighth day of September last, when they had proceeded within sight of and had actually made land off Egg-Harbour, on the coast of New Jersey with the said sloop or vessel her tackle, apparel, furniture and cargo, and also with the said captain John Underwood, and the said mate, passengers and other persons confined and under their power and command as aforesaid the said Thomas Houston the libellant in this cause with his officers, mariners and seamen, on board the said armed brigantine Convention did discover, fire upon and illegally take possession of the said sloop or vessel called the Active, her tackle, apparel, furniture, and cargo, she being then on her way to Egg-Harbour aforesaid then in the possession and under the power of these claimants, the said Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke, as legal prize and booty of war which is the same taking and seizure in the said libel mentioned. And this they are ready to verify. Wherefore they humbly pray this honourable court that the bill of the said Thomas Houston may be dismissed and that the said sloop or vessel called the Active, now riding at anchor in the port of Philadelphia, and within the jurisdiction of this court, her tackle, apparel, furniture and cargo, may be adjudged and condemned as lawful prize and booty of war, to and for the use of these

claimants according to the laws of nations and the resolves of congress in such case made and provided.

WILLIAM LEWIS, *pro resp.*

Sworn to 19th October, 1778, by Gideon Olmsted and Artemas White, before me, GEORGE ROSS.

In support of the claim and answer of Gideon Olmsted and others, the following depositions were taken and filed.

Thomas Houston, esq. *vs.* The sloop Active, &c. } In the court of admiralty of Pennsylvania.

James Holmes a native of Great Britain, and about forty-one years of age, a witness produced, sworn and examined in this cause, on the part of the libellant, deposeth and saith, that he doth know the sloop Active; that she belongeth to captain Bragg, of the island of Jamaica; that the cargo of the sloop belongs to sundry persons, subjects of the king of Great Britain; that this deponent sailed from the island of Jamaica aforesaid, in the said sloop, as a passenger, on the 1st day of August last, bound on a voyage for New York; that in the night of the 6th of September, between 11 and 12 o'clock, the deponent was awakened by a noise, which he afterwards found to have been the moving of a cable; that he called to captain Underwood, and said he believed the wind had shifted, as the vessel seemed to be gibing; upon which the captain went to the door of the companion, and found himself stopped and resisted. The captain thereupon called to Mr. Olmsted to let him up, which was refused. The deponent asked the captain what was the matter; he answered, that the Americans (meaning those people who were upon deck) had rose and taken the vessel: whereupon the deponent and the rest of those who were in the cabin (to wit, Mr. Jackson, the mate, and Mr. Anderson) all got up, to consult

what was best to be done; that the captain got Mr. Jackson's pistols in the dark, and loaded them; the mate likewise loaded a pair of old pistols in the cabin. The captain then, being enraged, swore he would retake the vessel, or lose his life—upon this a pistol was fired. Mr. Jackson and the deponent then expostulated with the captain; that it was mere madness at that time of night to do any thing towards recovering the vesssel; but to let matters stand still the morning:—in the mean time, Mr. Jackson and deponent begged of Mr. Olmsted to consider their situation, and if possible, to make the others on deck allow those below to come upon deck, and return to their duty as formerly. Mr. Olmsted, for answer, said, that they would not agree to any such thing, but had no intention of hurting the passengers or captain, in person or property, if they would be easy: and one of them on deck, but he knows not which, said they would take the boat and go on shore. In the morning, Mr. Jackson and the deponent asked the people on deck, if they would take the boat and go on shore when they made the land? to which an answer was made in the negative. Then firing began by the captain and mate with pistols, through the chinks of the cabin, out at the companion door. That at the time of the answer just mentioned, those on deck said, that the sloop would be taken before she could get into port, and that she might as well be taken by them as others. The firing continued for some time, when the captain thought of taking off the rudder case to stop the rudder. In consequence, the rudder was wedged up by the captain and mate which continued in that situation for some time—the people on deck at the same time endeavouring with handspikes to break the wedges away—that after a time the people on deck told the captain, that if he did not leave off firing his pistols, they would fire a four-pounder into the cabin. To which the captain answered, they might fire and

be damn'd. Whereupon the people on deck fired, which struck a puncheon of rum and barrel of coffee, but did no other damage. Upon this Mr. Jackson and the deponent entreated the captain to leave of firing, as they thought there was no practicability at that time of retaking the vessel, which he the captain positively refused, saying, he knew what it was to be a prisoner; and without money and friends, there would be poor comfort in a gaol: on which Mr. Jackson offered to pay the expenses of the captain while he might be a prisoner and also to give him the amount of his venture, to pay the mate his wages and his expenses till he should return to Jamaica, provided that the captain would unwedge the rudder and leave off firing. This offer the captain did not accept of; and firing in consequence took place on both sides for a considerable time, till a swivel gun was fired by the people upon deck, which was the last. Mr. Jackson and deponent then talked with the captain, and told him, if he was easy about his own life, he ought to have a regard for the passengers; and that they thought it was in vain to hold out longer, by keeping the rudder wedged. The captain said he would do any thing in his power to oblige Mr. Jackson, but that of being made a prisoner, which was very disagreeable to him. Mr. Jackson then made a tender of his former offer to him and the mate, and after talking some time together with him, the captain gave Mr. Jackson liberty to make the best terms for himself that he could, and that he the captain would unwedge the rudder. Mr. Jackson then called to the people on deck, who were then knocking off the stern boards of the vessel, and said, that if they would take the boat when they made the land, he would unwedge the rudder; to which they answered in the negative. Mr. Jackson then proposed to them the allowing himself and the deponent to come upon deck, which they refused. The deponent thereupon asked them if they intended to keep those in the cabin down and

stifle them?—they on deck answered that they would give them air enough presently. Mr. Jackson then said if they on deck would leave off firing he would be satisfied; to which those on deck answered, that if those below would leave off, they would also; and thinks this answer was made by White. Upon which the rudder was unwedged, and a parley took place. This was on Monday, the 7th, he thinks between 11 and 12 in the forenoon. The people on deck then asked them below, if they were in want of any thing: on which either Mr. Jackson or deponent desired that if any of the mutton was done, they would hand them down a piece at the cabin window; which those on deck accordingly did. Those on deck then asked them if they wanted any fowls or ducks cooked, and said that every thing should be done for them as formerly; to this deponent answered No, there was no occasion. In this situation things continued from Monday about 12 o'clock, until Tuesday about half past ten in the forenoon, when they were relieved by the Convention brig.

Being crossexamined, he saith, that he does not recollect those on deck giving victuals to those below more than once; that from Monday at 12 o'clock till Tuesday when the Convention brig boarded the sloop, those on deck had the entire direction of the sloop, and no resistance was made by those below; that immediately after the deponent got on board the Convention, and about one quarter of an hour after he had been released from the sloop's cabin, he saw the land, he thinks about three leagues distant, and this was about half an hour after the Convention had first come up with and hailed the sloop; that when the Convention hailed the sloop, she asked, from whence she came; Mr. Olmsted answered, that she was from Jamaica. The brig asked where she was bound; Olmstead answered for Egg-Harbour: and on being further asked what sloop she was, Mr. Olmstead replied, a prize. —That one or both of the pistols which the mate loaded were

fired, but they were not good for much and snapped often before they went off; but that three shot were fired out of them; that a small sword, couteau de chasse, a pair of pistols belonging to the mate, and an old musket without a lock, were all the arms which those in the cabin had in their possession; that he doth not know exactly what quantity of ball were in the cabin; that a few which Mr. Jackson had, and a few the mate got from his chest, were all he knows of; and that they were all too large for the mate's pistols except the three which were fired; and that some spoons were cut up for slugs by the mate by order of the captain; that Mr. Anderson was confined to his bed, in a very bad state of health; that Mr. Jackson was also in an ill state of health, and had the day before the rising of the crew sprained his ancle, so that the evening before the captain was obliged to help him into his cabin, but was upon his feet the next day during the action; and that the deponent himself was troubled with rheumatic complaints; that he is not a seaman, nor hath ever commanded a vessel; that after the mutton was handed down, the captain eat some of it, and went to sleep, giving the mate charge to take care of things below, while he should sleep; that while the captain slept, Mr. Jackson, the mate, and deponent, entered into an agreement that they would not go into further rash measures with the captain, but concluded to trust to Providence, in expectation that they might fall in with some of the king's ships or a privateer, and had entirely given over all expectation of regaining the vessel; that the captain did not make any farther proposal after he awoke, but the mate and he talked together; that those on deck made way with the vessel whilst the rudder continued blocked.

Being examined on the part of James Josiah, a claimant in this cause—that soon after the deponent got on board the

Convention, a man from the masthead called out a sail—upon which Capt. Houston said he supposed it was captain Josiah; that some officers, on taking a spyglass, and viewing her, said on her nearer approach, that they knew her to be Captain Josiah. That the deponent knoweth not at what distance she was when first discovered, what course she was then steering, or whether she could have been seen from the deck—she went in shore and came to an anchor.

JAMES HOLMES.

Sworn and subscribed, 19th Oct. 1778. coram

GEO. ROSS.

Ex. Atrue copy.

ALEXANDER ROBESON, *Reg.*

Thomas Houston, esq.
vs.
The sloop Active, &c.
} In Curia admiral. Pennsylvaniæ.

Robert Robson, a native of England, and about 60 years of age, a witness produced, sworn and examined on the part of the claimants in the above cause deposeth and saith—that he doth know the sloop called the Active, libelled in the above cause; that the last port the said sloop sailed from was Montego Bay, in the island of Jamaica; that she was then commanded by John Underwood, and was bound for the port of New York, with a cargo of rum, coffee, pimento, &c.—that the said sloop, and he believeth her cargo, was the property of captain Bragg, of the island of Jamaica; that the said sloop sailed from Montego Bay about the first of August last, having on board Gideon Olmsted, Artemas White, Aquila Rumsdale, and David Clarke, claimants in the above cause, who had been sent on board the said sloop as prisoners of war—and he hath heard that the said claimants did duty as mariners on board the said sloop; that the said sloop sailed under convoy of the Glasgow man of war, and continued company with her about 27 days, when on a Sunday after-

noon the said sloop left the said convoy, and the Friday morning following made the land of Cape Charles, and the same day spoke a privateer out of New York, who hailed the sloop, and on being informed the said sloop was going for New York, told them to keep to the eastward, for that if they stood in shore the American privateers and armed boats were so thick, that it would be impossible to get into New York; upon which the said sloop steered northeast about twenty-four hours, with a fine breeze at S. E. until she fell in with captain Goodrich who gave them the same information and advice as the privateer above mentioned; that captain Goodrich offered them some swivels; that captain Underwood answered they were not necessary, for that he had as many guns as men; that after parting with capt. Goodrich they continued the same course; that on Friday they parted with Goodrich, and on Sunday following, this deponent being at the helm, about 12 o'clock at night Gideon Olmsted above mentioned called the watch; and this deponent being relieved by George Roberts, was going below, when the said Olmsted and the aforesaid Artemas White hauled the ladder out of the companion; that this deponent seeing that done told the said Olmsted and White he hoped they would not hurt him; to which Olmsted answered No, and bade him go take the helm, which he did, and ordered him not to speak to any person in the cabin; that immediately after the said Olmsted, White, David Clarke, and the aforesaid Rumsdale, got a cable and coiled it over the companion, laid a tarpaulin over it, and stuffed jackets and greatcoats, in order to prevent those below from firing through at those upon deck; that there were in the cabin the captain, mate, three passengers, and a negro; the rest of the crew, to wit, the four above named, this deponent, and George Roberts above named, were on deck; that the captain and mate said they would come on deck, and insisted

on it; they were answered by Mr. Olmsted, that they should not; that in a little time, and before the companion was thoroughly secured as above, a pistol was fired by one of those below through the companion, the ball of which wounded the aforesaid Mr. Olmsted; that those below fired no more until near day-light, when Mr. Olmsted ordered this deponent to steer northwest for Egg-Harbour, which he did until day-break; that then they hauled down the sails, and hove the sloop to till sunrise; that the sails were hauled down in order to prevent the said sloop's being discovered by English privateers; that he, this deponent, received orders to haul down the sails as a prisoner then being on deck; that at sunrise George Roberts was sent to the masthead to look for land; that on his coming down, and informing he saw none, nor any sails, the said sloop again made sail and stood for Egg-Harbour, and steered that course until Tuesday morning, at day light, they made the land of Cape May, then again hauled down their sails until sunrise, in order to see if they could discover any sail, but discovering nothing, made sail again and steered northwest until about nine o'clock, when, being within four leagues of the land, they descried a sail; that the sloop continued on her course, and the sail stood for the sloop; that when the sail came within reach, she fired a gun under St. George's colours, upon which the sloop then hauled her wind; the sail then fired a second shot, upon which captain Underwood hung the colours out of the cabin window of the sloop; that when the sail came up, she proved to be the brig Convention, and hailed the sloop, and demanded where she was from? to which Mr. Olmsted answered that she was from Jamaica: the brig then asked where they were bound? and Olmsted answered for Egg-Harbour; the brig then asked what vessel's prize she was? Mr. Olmsted replied she was taken by the

Revenge's people; the brig, which was commanded by captain Houston, then hoisted out her boat and came on board—that when the brig's people came on board, they asked where the captain of the sloop was; to which Mr. Olmsted answered he was confined below in the cabin; that the brig's people carried Mr. Olmsted on board the brig and left him; the boat then returned on board the sloop, and the hands of the brig opened the cabin, and let up those who were below; when capt. Underwood came on deck he was asked for his papers; he answered he had none, but had thrown them overboard; that thereupon the brig's people took Mr. Jackson and Mr. Holmes, two of the sloop's passengers, on board the brig; and the sloop made sail and got within the Cape about four or five o'clock in the afternoon; that at the time the brig boarded the sloop she was about three leagues from land; and that it was about ten o'clock in the morning; that on the Monday after the crew took possession of the sloop as aforesaid; upon the pistol being fired which wounded Mr. Olmsted, he told those below if they began that work they should have enough of it; that those below did all in their power to force their way up, and kept a hot and continual fire until nine or ten o'clock in the forenoon, when those on deck threatened, that if those below did not cease firing, they on deck would fire a fourpounder through the bulkhead; that those below still keeping up their fire, those on deck actually fired the fourpounder as they threatened; the party below notwithstanding continued their fire, upon which the party on deck fired the fourpounder a second time through the bulkhead; that the party below still refusing to cease their firing, those on deck unbent the foresail, lashed it round the companion, got a swivel, loaded it with fifteen or sixteen musket balls, and pointed it down the companion; after which those below fired no more, but told those above they were

laying a train to blow up the vessel; that thereupon the said swivel was fired into the cabin; that whilst those on deck were busied forward, those below wedged up the rudder—that when they came aft, and found the rudder wedged, they, the party on deck, got crows and handspikes, and poised off one of the stern planks: whereupon the passengers below consulted together, and begged of those above that they would not expose them to the weather, and said that if they would not pull off the plank, they, the passengers, would beg the captain to let the rudder be unwedged; that this was desired by Mr. Holmes and Mr. Jackson two of the passengers; and he, this deponent, heard it; that thereupon the captain unwedged the rudder; that on Monday morning Mr. Olmsted told those below that he did not mean to take the owner's or any other person's property; that when they got near the land they would deliver the vessel up, to which Mr. White answered, No: the vessel is now in our possession, and there she shall continue: to which Mr. Olmsted said not a word—that he believes that what Olmsted said, with respect to giving up the said vessel, was intended only to pacify those in the cabin; that the said sloop, notwithstanding the rudder's being wedged, could have been steered by an oar or sweep, or a bite of a cable; that he hath been on board a vessel where they had the misfortune of losing the rudder, and were obliged to steer with the cable as aforesaid; that there were at that time four oars on board said sloop.

Being crossexamined, he saith, that Mr. Olmsted ordered him to haul down the sails as aforesaid; and that he conceived himself to be a prisoner, because he had given himself up at the taking possession of the sloop as above stated; and that he did this for the preservation of his own life; that he cannot certainly tell whether George Roberts went up to the masthead of his own accord, or was sent; that after the

brig hailed the sloop, she hoisted American colours; that the brig fired at the sloop before she hailed her; that the reason of Olmsted's answering the brig that the sloop was a prize to the Revenge's people, he believes to have been because they had themselves been before taken by the English, and had now got revenge; that the reason why he thinks Olmsted only meant to pacify those below, by telling them he did not mean to take their property, and that he would restore the vessel when they got near the shore was, because he, the said deponent, would in such circumstances have done the same thing; that at the time Mr. Olmsted said this, those below were very busy loading their arms and firing, and that it was before the rudder was wedged as aforesaid; that there were between thirty and forty gallons of very good rain water upon deck; and further this deponent saith not.

ROBERT ROBSON.

Sworn October 7th 1778, before me

GEO. ROSS.

Thomas Houston, commander of the armed brig Convention, *vs.* The sloop Active and cargo,—Gideon Omsted, Artemas White, Aquila Rumsdale, & David Clarke, claimants.	In the ADMIRALTY.

George Roberts, a native of Cheshire, in England, about sixteen or seventeen years of age, a witness produced, sworn and examined in this cause, on the part of the claimants, maketh oath and saith, that about the first day of August last he sailed from Montego Bay, in Jamaica, on board the sloop Active, as a seaman, on a voyage from thence to New York; that the said sloop was commanded by John Underwood, and loaded with a cargo of rum, coffee, &c. that whilst the said sloop was loading, the above claimants, Artemas White,

Aquila Rumsdale and David Clarke, who had been taken prisoners by the Royal George and brought into Jamaica, were put from the said Royal George on board the Active, as prisoners of war, to assist in navigating and conducting the said sloop from thence to New York; and the said Olmsted, who had been taken in a French privateer, and brought into Jamaica by the armed sloop Ostrich, was for the purpose aforesaid put on board the sloop Active; that after sailing from Jamaica, they met the brig Tryon, of 16 guns, belonging to the enemy, from whom they learned that the enemy had evacuated Philadelphia, the captain of which brig told captain Underwood that so many American privateers and armed boats were along the coast, as made it impossible for any vessel to get clear, and therefore, directed captain Underwood not to haul in until he should come to the latitude of 40, and offered to lend him swivels, but was answered by captain Underwood that he had more swivels than men to fight them, and therefore did not take them; that about twelve o'clock of the succeeding night (being Sunday night) the above claimants, Gideon Olmsted, Artemas White and Aquila Rumsdale, together with Robert Robson, being on the deck, the said Rumsdale called the watch, upon which this deponent, with David Clarke, the other claimant, came upon deck; and the captain and mate of the sloop were also coming up, but were prevented by the above claimants, who told them that if they did come upon deck, they would certainly kill them, or do them some damage, and immediately drew up the ladder, leaving the said captain and mate, three passengers and a negro man belonging to one of the passengers, below; that the said claimants, or some of them, said to the captain, that they had taken the possession and command of the said sloop, and were going to bring her into the first

American port they could make, and immediately coiled a cable round the companion, and put the tarpaulin round the companion, and by this means stopt the passage entirely so that those below could not make their way up: upon which, after some conversation passing between those below, they began to fire with muskets or pistols, as he supposes, since they were in the possession of both; that the musket they had was without a lock; that at this time those below had half a barrel of powder, but no shot, except a few at the beginning, and therefore cut up spoons to shoot with, as he believes, because when the brig's people came on board, he, this deponent, going down into the Active's cabin, found two pieces of a large pewter spoon, which is now deposited with the register of the court, and which from their then condition, and that of another piece thereof now missing, this deponent was induced to believe had been some of the spoons used for the purpose aforesaid; that the parts of the spoon are now in the state in which they were found as aforesaid, except with respect to the said piece, which was about one inch in length, and half cut off, and which hath been since broke entirely off and lost; that the said deponent took up both the pieces of the spoon in the Active's cabin, and hath constantly kept possession thereof since, and refused to deliver the same on request of one of the claimants in this cause; but that about three days ago he, this deponent, on a second application of the said claimant, delivered him the same pieces which are now produced by him, and delivered the said register, and are the individual pieces found as aforesaid, except with respect to the piece above mentioned to have been lost; that they had two pistols; that they also had about half a puncheon of bread, one puncheon of water, but no meat or flour, or any thing else to live upon; those persons on deck had two fourpounders, two swivels, two axes and a hatchet, besides about

thirteen or fourteen shot for the fourpounders, and about three hundred of musket balls for the swivels, with plenty of powder, with a barrel of water upon deck, about thirty or forty gallons in a puncheon in the forehold, a barrel of Indian corn, which they parched and eat instead of bread, four sheep, three goats, two large pigs, about four or five dozen of ducks and fowls, and three turtle, weighing, as he supposes, about three hundred and fifty pounds in the whole; that upon those below begging for provisions, those upon deck supplied them with meat; that the firing from below continued with some intermissions till daybreak on Monday morning, but does not recollect they fired afterwards; that about daybreak the said claimants, being on deck, fired two fourpounders off the main-deck through the bulkhead into the cabin, then unbent the foresail, lapped it round the companion, and lashed it down, that those below might not see those on deck so as to fire at them, and afterwards, after threatening those below much, cut a hole through the foresail, pointed a swivel loaded with sixteen musket shot to it; that before this, those below had wedged up the rudder, and were now told by those on deck, that if they would not unwedge it they would fire upon them; and upon their refusing, and attempting to stop those above from tearing away the planks so as to unwedge the rudder, they fired the said swivel, loaded as aforesaid, into the cabin, at about twelve o'clock at noon, as he thinks, which was the last gun fired on either side; that about one or two o'clock on Monday, as those upon deck were pulling away the plank to unwedge the rudder, the passengers begged those upon deck not to do it, as it would expose them to the weather, and they would prevail upon the captain to pull out the wedges, which they accordingly did, and those upon deck, had the command of the rudder; that when those upon deck first rose upon those below, the said sloop Active was

steering a northeast course, and that so soon as those on deck got the command of the vessel, they altered to a northwest course; that during the whole of the time the wind was at southwest; that the crew drank the water; and that they tried an experiment by burning some rum, in order to determine whether they could by that method so weaken it as to make it drinkable, in case they should be driven to sea, and be in want of water, and they found it could be done; that the crew on deck could at all times have recourse to and get at the cargo of rum; that he thinks the persons in the cabin were entirely in the power of those on deck; that during the contest between the persons below and on deck, and about the beginning of it, those below threatened that if those above did not give over the dispute, that they below would blow up the vessel, to which Mr. Olmsted replied, they might do it and be damned, he was no more afraid of going to the bottom than they; that he heard Mr. Jackson, one of the persons below, ask those above if they would give up the vessel when they got near the land, and that some of those on deck said to each other that they had begun the thing and must now go through with it, and that they would never give her up; that those on deck could have steered the sloop by the sails and other means, if the rudder had not been unwedged; that after the crew on deck took possession, they stood northwest, and sailed at the rate of five knots an hour, until Tuesday morning about daybreak; that about sunrise they discovered land about five leagues distant, at which time they also saw a brig, which taking to be an English privateer, they hauled down their sails; that the said brig afterwards proved to be the brig Convention; that the brig stood off the land, and so soon as she got abreast of the sloop, the sloop made sail and stood in for the land; that on the sloop's making sail, the brig put about and stood after the

sloop, and fired at and hailed the sloop under English colours; she asked from whence the sloop came; those on board the said sloop answered from Jamaica; that the said sloop was a prize, and bound for Egg-Harbour; the brig then hoisted American colours, and afterwards boarded the said sloop; that Mr. Olmsted told the brig's people who came on board, that they of the sloop did not want any of their assistance; that they could carry in the sloop themselves since they were so near the land; that at the time the brig boarded the sloop, which was at twelve on Tuesday, the said sloop was about three leagues from land; and that the said sloop got within the Cape and came to anchor in Delaware bay, between four and five o'clock in the afternoon of that day; that the brig's people, on coming on board, took possession of the vessel and broke open the cabin; that at the time of their boarding, the crew on deck had possession of the sloop; that there was on board the said sloop a boat that could carry four hogsheads of rum; that he thinks the people on deck could have filled the cabin with water if they had chosen; that the brig's pople took all those who were on deck at the time of their boarding, except this deponent, carried them on board the brig, and there confined them (that is, would not permit them to return on board their own vessel); that after the brig had taken possession of the sloop, captain Underwood and the sloop's passengers came to this deponent to speak to him; but this deponent would not speak to them, because they called him a pirate at first; that when those on deck first took possession of the sloop, captain Underwood called out to this deponent and one Robert Robson, and wanted to speak to them; that Mr. Olmsted immediately ordered them not to speak to him.

Being crossexamined, he saith, he kept the spoon in order to show it, and because he had a regard for it, as part of it had been fired at him; and the reason of his refusing to deli-

ver it to the claimant, as above stated, on his first request, was because he was not at home when he was asked for it; that he took the spoon of his own accord and locked it up; that no person saw him take it; that Mr. Olmsted never desired him either to take or keep the spoon; that the way the said claimant came to know he had the spoon was, that the said deponent told David Clarke that he, said deponent, had taken it; that the water on deck was rain water, and sweet, having been there only three days; and those on deck supplied those below with mutton four or five times; that Mr. Olmsted was the person who returned the answers stated in the above deposition to have been given the brig when hailed; that he, the said deponent, did not assist the persons on deck, except in working the vessel according to their orders; that the sloop, at the time she sailed from Montego Bay aforesaid, was the property of captain Bragg, of Jamaica aforesaid; and that the cargo was shipped at Jamaica: that he doth not certainly know to whom it belonged; and further this deponent saith not.

GEORGE ROBERTS.

Sworn 7th October, before me,
GEORGE ROSS.

1778, *November* 4. THE COURT being met pursuant to adjournment, and the jury being called and sworn to try the truth of the several facts alleged and set forth in the bill, &c. returned the following verdict:

In the cause wherein Thomas Houston is libellant and Olmsted and others first claimants, and James Josiah second claimant, we find as follows:

One fourth of the neat proceeds of the sloop Active and her cargo to the first claimants.

Three fourths of the neat proceeds of said sloop and her

cargo to the libellant and second claimants as per agreement between them.

James Budden, foreman,	William Hollinshead,
Joseph Bulloch,	John Pringle,
John Young, jun'r.	William Woodhouse,
Alexander Tod,	Benjamin Scull,
Robert Aitken,	William Revden,
William Shute,	Moses Bartram.

November 4th, 1778.

Judgment 5th November, 1778. Olmsted et al. The claimants appeal.

Thomas Houston
v.
Sloop Active. } In Curia Admiralitatis Pennsylvaniæ.

Be it remembered, that on the seventh day of November Anno Domini one thousand seven hundred and seventy eight, before me George Ross, esq. judge of the court aforesaid, came the honourable major general Benedict Arnold, of the city of Philadelphia, and Stephen Collins, of the same city, merchant, and acknowledged themselves to owe and be indebted to Thomas Houston, the libellant in the above cause, and James Josiah et al. claimants in the sum of two thousand pounds, lawful money of Pennsylvania, to be levied on their respective goods and chattels, lands and tenements, to the use of the said Thomas Houston and James Josiah, their executors, administrators and assigns, upon condition that Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke, shall and do prosecute to effect their appeal entered in the said court from the sentence or decree thereof in the above cause, or if upon dismission of the said appeal or final judgment or confirmation of the said sentence by the honourable continental congress, or such

court and authority as they shall constitute and appoint to hear and determine the said appeal; the said appellants shall answer and pay the said Thomas Houston and James Josiah all such costs and charges as shall be decreed and adjudged upon the said appeal against the said appellants, then the above recognisance to be void or else to remain in full force and virtue.

BENEDICT ARNOLD, L. S.
STEPHEN COLLINS. L. S.

Taken and acknowledged the day and year above written coram, the interlineations being first made,
GEORGE ROSS.

By resolutions of congress in 1777, a committee of appeals was appointed, any three of whom were empowered to hear and finally determine upon appeals brought to congress. In 1778, the committee consisted of William Henry Drayton, before that period chief justice of the state of South Carolina, William Ellery, John Henry jun. and Oliver Elsworth, late chief justice of the United States.

In December 1778, the case of Houston qui tam appellees *ads.* Gideon Olmsted &c. appellants, was brought before those gentlemen as commissioners appointed by congress to determine appeals from the courts of admiralty of the several states to congress. The proceedings before the commissioners follow:

Thomas Houston esq. &c. appellees *v.* Gideon Olmsted &c. appellants.	In the court of commissioners of appeals for the United States of America.

At a court held at the statehouse in the city of Philadelphia on the twelfth day of December in the year of our Lord one thousand seven hundred and seventy eight before

the honourable William Henry Drayton, John Henry the younger and Oliver Elsworth, esqrs. commissioners appointed by the honourable congress to hear, try and determine all appeals from the courts of admiralty of the several American states to congress came the parties, as well appellants as appellees, in the above cause by their respective advocates, and after solemn argument and full hearing of the said parties by the said advocates, the said court took time to consider thereof and held the same under advisement until the fifteenth day of December aforesaid. At which day the said court being again met proceeded to the publication of their definitive sentence or decree upon the said appeal; which being read and filed is in the words following to wit:

Thomas Houston esq. &c. appellees *v.* Gideon Olnmsted &c. appellants and claimants of the sloop Active, her cargo &c.	Appeal from the court of admiralty of the state of Pennsylvania.

We the commissioners appointed by the honourable congress of the United States of America to hear, try and determine all appeals from the courts of admiralty of the several states aforesaid to congress, having heard and fully considered as well all and singular the matters and things set forth and contained in the record or minutes of the proceedings of the court aforesaid in the above cause, as the arguments of the advocates of the respective parties in the above appeal, do thereupon adjudge and decree that the judgment or sentence of the court of admiralty aforesaid be in all its parts revoked, reversed and annulled. And we do further decree and adjudge that the sloop or vessel called the Active, her tackle, apparel and furniture, and all the goods, wares and merchandise laden and found on board her at the time of her capture as mentioned in the claim and answer of Gideon Olmsted, Artemas White, Aquila

Rumsdale and David Clarke the appellants be condemned as lawful prize to and for the use and behoof of them the said appellants; and that process issue out of the court of admiralty aforesaid commanding the marshal of the said court to sell the said sloop Active and her cargo at public vendue for the highest price that can be gotten for the same, and after deducting the costs and charges of the trial in the said court of admiralty and the expenses attending the sale of the said sloop &c. that he pay the residue of the said moneys arising from the said sale unto the appellants aforesaid their agent or attorney.* And we do further adjudge and decree that the appellees pay unto the appellants in this cause the sum of two hundred and eighty dollars for their costs and charges by them expended in sustaining and supporting their said appeal.

W. H. DRAYTON.
JOHN HENRY, Jun.
WILLIAM ELLERY.
O. ELLSWORTH.

A certified copy of all which proceedings was regularly transmitted to the judge of the court of admiralty aforesaid by the register of the court.

* In the case of "the schooner Two Brothers," which was brought by appeal to congress from the court of admiralty of Rhode Island, the court of appeals reversed the sentence of the court of Rhode Island, founded on the verdict of a jury, although by a law of that state appeals in cases where there had been a trial by a jury *were expressly prohibited*. A prohibition of this kind in the laws of any state was a usurpation of that sovereignty which existed in the United States alone.

It is not unworthy of remark that Mr. M'Kean was at that time President of the court of appeals, and signed this decree of reversal; and yet we afterwards find him, as Governor of Pennsylvania originating and approving the opposition of this state to the execution of a decree of the same court in a similar case.

Afterwards on the twenty-eighth day of December aforesaid at a court held at the statehouse aforesaid, present all the commissioners above named, the advocates on the part of the appellants exhibited to the said court copies of two papers, the one purporting to be a second decree or sentence of the said court of admiralty in the above cause, and the other purporting to be a writ or warrant from the judge to the marshal of the said court, which being severally read are as follows to wit:

Thomas Houston esq. &c. appellees *v.* Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke appellants and claimants of the sloop Active and cargo.	In the court of admiralty for the state of Pennsylvania.

The court taking into consideration the decree of the court of appeals in this cause reversing the judgment and sentence of this court in the same cause, and further decreeing a condemnation of the said sloop Active, her tackle, apparel, furniture and cargo as prize &c. and that process of this court should issue for the sale of the said sloop, her cargo &c. and for the distribution of the moneys arising from the said sale (after deducting costs) to the claimants above named, their agent or attorney, after mature consideration are of opinion that although the court of appeals have full power to alter or set aside the decree of a judge of this court, yet that the finding of the jury in the cause does establish the facts in the cause without reexamination or appeal.

And therefore the verdict of the jury still standing and being in full force, this court cannot issue any process or proceed in any manner whatsoever contradictory to the finding of the said jury. And therefore doth now decree, order and adjudge that the marshal of this court be com-

manded to sell at public vendue for the highest price that can be gotten for the same, the said sloop or vessel called the Active, her tackle, apparel and furniture, and the goods wares and merchandises laden and found on board her at the time of her capture &c.; and after deducting the costs and charges of the trial, condemnation and sale thereof out of the residue of the moneys arising from the said sale, that he bring the residue thereof into court ready to abide the further order of this court therein.

GEO. ROSS.

December 28th, 1778.

Court of Admiralty. }
Pennsylvania ss. }

George Ross esquire, judge of the court of admiralty for the state of Pennsylvania to Matthew Clarkson esquire, marshal of the city and county of Philadelphia, greeting:

Whereas at a court of admiralty lately held at Philadelphia upon the bill of Thomas Houston esq. qui tam &c. exhibited to the said court, it was adjudged and decreed that the sloop or vessel called the Active, her tackle, apparel and furniture, and the goods, wares and merchandise laden and found on board her at the time of her capture should be condemned as prize and sold, and after deducting the costs and charges of the trial, condemnation and sale thereof out of the moneys arising from the said sale, out of the residue of the said moneys, three fourth-parts should be paid unto the libellant and a certain James Josiah a claimant in the said cause, to and for the use of themselves &c. and the remaining one fourth-part of the said residue should be paid unto Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke other claimants in the said cause to and for their use, &c. according to the verdict of the jury impanelled, and sworn to try and determine, &c. in the same

cause from which judgment or sentence the said Gideon Olmsted and others last above mentioned, appealed to the honourable congress of the United States of America, or such court or authority as they should appoint to hear and determine the said appeal; and it was in such manner proceeded that the honourable court of commissioners of appeal for the said states did by their decree, transmitted into this court, reverse, annul and make void all and every part of the judgment or sentence of the court of admiralty aforesaid, and did further adjudge and decree that the said sloop Active, &c. was lawful prize, and that process of this court should issue commanding a sale thereof, and that after deducting costs, &c. the residue of the moneys arising from the said sale, &c. should be paid to the claimants last above mentioned, their agent or attorney, to and for their sole and absolute use and disposal, &c. This court therefore taking into consideration the premises and being of opinion that consistent with the laws of this state it cannot carry into execution the whole of the said sentence of the honourable the court of appeal aforesaid, yet willing, so far as the said sentence appears legal, to carry it into effect, and to prevent as far as possible any injuries or losses which the parties to this cause or either of them may be liable to by the vessel and cargo, &c. continuing in their present situation, do therefore hereby command you forthwith to sell at public vendue for the highest price that can be gotten for the same the said sloop or vessel called the Active, her tackle, apparel and furniture, and the goods, wares and merchandise laden and found on board at the time of her said capture, and after deducting the costs and charges aforesaid to bring the residue of the said moneys into court, ready to abide the further order of this court. And how you shall have executed this writ make return to me at a court of admiralty, to be held at

my chambers in Philadelphia the seventh day of January next, together with this writ. Given under my hand and seal at Philadelphia the twenty eighth day of December in the year of our Lord one thousand seven hundred and seventy eight.

GEORGE ROSS.

By virtue of the foregoing writ I have deposited in the court of admiralty the sum of forty seven thousand nine hundred and eighty one pounds two shillings and five pence, Pennsylvania currency, on account of the cargo of the prize sloop Active in the said writ mentioned.

The said sloop being yet unsold no moneys have come into my hands on account of her. So answers

MATTHEW CLARKSON, Marshal.

January 4th, 1779.

I do acknowledge the marshal has deposited in my hands as judge of the court of admiralty the above sum, as he has returned above.

GEORGE ROSS.

And hereupon it was moved, on the part of the appellants aforesaid, that process might issue to the marshal of the admiralty of Pennsylvania commanding him to execute the decree of this court; and after argument had thereon the court appointed Monday the fourth day of January next, at five o'clock in the afternoon, for hearing a further argument upon the said motion.

And afterwards, to wit, the fourth day of January aforesaid, at eight o'clock in the morning, the said court being again convened upon the pressing instance and request of the claimants in this cause, present, the honourable William Henry Drayton, William Ellery and John Henry, esquires, commissioners as aforesaid, &c.

It was moved and suggested by the advocates for the said claimants, that, notwithstanding the decree of this court above set forth and transmitted to the judge of the court of admiralty aforesaid, the said judge had appointed the hour of nine this morning for the marshal of the said court to pay into the said court the moneys arising from the sale of the said sloop Active and her cargo, &c. and prayed that the register of the said court might be sworn and examined in support of the said motion and suggestion. Whereupon the said register being sworn, his deposition was taken down in the words following, viz.

United States of America, ss.

On the fourth day of January in the year of our Lord one thousand seven hundred and seventy nine, before us, the subscribers, commissioners appointed by the honourable congress to hear, try and determine all appeals from the courts of admiralty of the several states aforesaid to congress, personally appeared Andrew Robeson, register of the court of admiralty of the state of Pennsylvania, and being duly sworn, deposeth and saith that he, as register aforesaid, received notice from the judge of the said court, by the marshal of the said court, to attend at the chambers of the said judge at nine o'clock this morning, for the purpose of making a minute on record of the said marshal's having paid into the said court the moneys arising from the sale of the cargo of the sloop Active, lately libelled against in the said court by Thomas Houston, &c. and further saith not.

Sworn and subscribed the day and year
aforesaid, before us,

WILLIAM HENRY DRAYTON,
JOHN HENRY, junr.
WILLIAM ELLERY,

Whereupon the advocates prayed that an injunction might

issue out of this court directed to the marshal of the court of admiralty aforesaid, and commanding him to keep and detain in his hands and custody the moneys aforesaid, until the further order of this court, which prayer being granted by the said court, process issued in the words following, to wit,

United States of America, ss.

The honourable court of commissioners of appeal for the United States of America to Matthew Clarkson, esq. greeting:

Whereas at a court lately held at Philadelphia in the state of Pennsylvania upon the appeal of Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke, from the sentence or decree of the court of admiralty of the state aforesaid to this court upon hearing, and full consideration of all and singular the matters and things set forth and contained in the record or minutes of the proceedings of the said court, in a certain cause there lately depending wherein Thomas Houston, esq. is libellant &c. and the above named Gideon Olmsted, &c. claimants after solemn argument and full hearing, of the advocates of the respective parties in the said appeal. It was adjudged and decreed by this court that the judgment or sentence of the court of admiralty aforesaid, should be in all its parts revoked, reserved and annulled: And that the sloop or vessel called the Active her cargo, &c. should be condemned as lawful prize for the use of the said appellants; and that process should issue out of the said court of admiralty commanding the marshal of the said court to sell the said sloop and her cargo, for the highest price that could be gotten for the same, and after deducting the costs and charges arising on the trial, condemnation and sale thereof to pay the residue of the moneys arising from the said sale unto the appellants, their agent or attorney. And whereas a copy of the decree, of this court hath been regularly transmitted to the judge of the said court of admiralty, and by a certified copy of the proceed-

ings of the said court, since receiving the said decree it appeareth manifestly to this court that the said judge hath refused to pay obedience to the said decree, and on the twenty-eighth day of September last, issued process returnable on the seventh day of January inst. commanding you as marshal of the said court of admiralty, to make sale of the said sloop her cargo, &c. And after deducting the costs and charges aforesaid, to lodge the residue of the moneys arising from the said sale, in the court aforesaid, ready to abide the further order of the said court. And whereas on the twenty-eighth day of December aforesaid, a motion was made in this court for a writ to issue to the said marshal, commanding him to execute the decree of this court and further argument on the said motion, was appointed to be heard at five o'clock this evening. And whereas it is testified to this court on oath, that this day at nine o'clock in the forenoon, is by special order of the said judge appointed for you to lodge the moneys arising from the said sale, in the said court, whereby, the writ upon the motion aforesaid, if this court shall think proper to issue such, will be eluded. These are therefore to command and firmly enjoin you to detain and keep, in your hands and custody, the whole of the moneys arising from the sale of the said sloop and her cargo, &c. Saving and excepting the costs and charges aforesaid, until the further order of this court be made known unto you as you will answer the contrary at your peril.

Given at Philadelphia in the state of Pennsylvania, the fourth day of January in the year of our Lord one thousand seven hundred and seventy nine.

WILLIAM H. DRAYTON.
WILLIAM ELLERY.
JOHN HENRY, Junr.

And now at five o'clock in the afternoon of the said fourth day of January, at a court held at the statehouse aforesaid, present the honourable the commissioners above named, the register produced to the said court the return indorsed by the above mentioned Matthew Clarkson esquire, on the above recited writ or injunction, which being read, is in the words following to wit,

In obedience to a writ under the hand and seal of the honourable George Ross esquire, judge of the court of admiralty for the state of Pennsylvania, I have deposited in the said court, the moneys arising from the sale of the cargo of the sloop Active within mentioned.

The said sloop being yet unsold, no moneys have come into my hands on account of her. So answers

MATTHEW CLARKSON,
Marshal of said court.

Philadelphia, January 4. 1779.

To the honourable the court of commissioners of appeal.

And inasmuch as it doth not sufficiently appear to the said court, from the said return, whether the moneys therein mentioned were paid to the court of admiralty previous or posterior to the receipt of the said writ, and the said marshal not being present in court, the register of this court was sworn and examined; and his deposition, being reduced to writing at the foot of the said return, is in the words following to wit,

United States of America, ss.

Andrew Robeson register of the court above mentioned, being duly sworn deposeth and saith that he delivered the within writ to the above named Matthew Clarkson, esquire, marshal of the court of admiralty above mentioned at the chambers of and in the presence of the judge of the said

court, before the hour of ten this morning, and previous to the payment of the moneys to the said judge as certified above by the said marshal.

WILLIAM HENRY DRAYTON,
WILLIAM ELLERY,
JOHN HENRY, Junr.

Sworn, January 4th 1779, in open court.

Whereupon the court declared and ordered to be entered on record, that as the judge and marshal of the court of admiralty of the state of Pennsylvania had absolutely and respectively refused obedience to the decree and writ regularly made in and issued from this court, to which they and each of them were and was bound to pay obedience; this court being unwilling to enter upon any proceedings for contempt, lest consequences might ensue at this juncture dangerous to the public peace of the United States, will not proceed further in this affair, nor hear any appeal until the authority of this court shall be so settled as to give full efficacy to their decrees and process.

Ordered that the register do prepare a state of the proceedings had upon the decree of this court in the case of the sloop Active, in order that the commissioners may lay the same before congress.

The commissioners of appeals finding their authority ineffectual, and having exercised all the power on the case they possessed, made a report of their proceedings to congress which will be found in their journals of that period. This report and the proceedings of congress thereon follow:

THE commissioners of the court of appeals of the United States, have the honour to report to congress the annexed proceedings in the case of the sloop Active, brought into that

court on appeal, in order that congress may take such measures in that behalf, as so extraordinary and important a subject may require.

WM. H. DRAYTON,
WILLIAM ELLERY,
JOHN HENRY, Jun.
OLIVER ELLSWORTH.

Philadelphia, January 19th, 1779.

Read in congress January 19th, 1779. Ordered to lie on the table.

In Congress, January 21, 1779.

Resolved, That the report of the committee on appeals, received the 19th instant, be referred to a committee of five, who shall examine into the principles of the powers of the said committee on appeals, and the causes of the refusal of the judge of the court of admiralty in the state of Pennsylvania, to execute their decree in the case therein mentioned, and report thereon specially to congress.

The members chosen, Mr. Burke, Mr. Paca, Mr. Root, Mr. Dyer and Mr. Smith.

Extract from the minutes,

CHA. THOMSON, Sec.

In Congress, March 6, 1779.

The committee to whom was referred the report of the committee on appeals, of the 19th of January, 1779, having in pursuance of the instructions to them given, examined into the causes of the refusal of the judge of the court of admiralty for the state of Pennsylvania to carry into execution the decree of the court, or committee of appeals, report,

That on a libel in the court of admiralty for the state of Pennsylvania, in the case of the sloop Active, the jury found a verdict in the following words, viz. " one fourth of the net proceeds of the sloop Active and her cargo to the first

claimants; three fourths of the net proceeds of the said sloop and her cargo to the libellant and the second claimant, as per agreement between them:" which verdict was confirmed by the judge of the court, and sentence passed thereon. From this sentence or judgment and verdict, an appeal was lodged with the secretary of congress, and referred to the committee appointed by congress to hear and determine finally upon all appeals brought to congress from the courts of admiralty of the several states.

That the said committee, after solemn argument and full hearing of the parties, by their advocates and taking time to consider thereof, proceeded to the publication of their definitive sentence or decree, thereby reversing the sentence of the court of admiralty, making a new decree, and ordering process to issue out of the court of admiralty for the state of Pennsylvania to carry this their decree into execution.

That the judge of the court of admiralty refused to carry into execution the decree of the said committee on appeals, and has assigned as the reason of his refusal, that an act of the legislature of the said state had declared, that the finding of a jury shall establish the facts in all trials in the courts of admiralty, without reexamination or appeal, and that an appeal is permitted only from a decree of the judge.

That having examined the said act, which is entitled "An act for establishing a court of admiralty," passed at a session which commenced on the 4th of August, 1778, the committee find the following words, viz: "The finding of the jury shall establish the facts, without reexamination or appeal." And in the seventh section of the same act, the following words, viz: "In all cases of captures an appeal from the decree of the judge of admiralty of this state, shall be allowed to the continental congress, or such person or persons as they may from time to time appoint for hearing and trying appeals."

That although congress by their resolution of November 25, 1775, recommended it to the several legislatures to erect courts for the purpose of determining concerning captures, and to provide that all trials in such cases be had by a jury, yet it is provided that in all cases an appeal shall be allowed to the congress or to such person or persons as they shall appoint for the trial of appeals."

Whereupon *Resolved*, That congress, or such person or persons as they appoint to hear and determine appeals from the courts of admiralty, have necessarily the power to examine as well into decisions on facts as decisions on the law, and to decree finally thereon; and that no finding of a jury in any court of admiralty, or court for determining the legality of captures on the high seas, can or ought to destroy the right of appeal, and the reexamination of the facts reserved to congress.

That no act of any one state can, or ought to, destroy the right of appeal to congress, in the sense above declared.

That congress is by these United States invested with the supreme sovereign power of war and peace.

That the power of executing the law of nations is essential to the sovereign supreme power of war and peace.

That the legality of all captures on the high seas must be determined by the law of nations.

That the authority, ultimately and finally to decide on all matters and questions touching the law of nations, does reside and is vested in the sovereign supreme power of war and peace.

That a control by appeal is necessary, in order to compel a just and uniform execution of the law of nations.

That the said control must extend as well over the decisions of juries as judges, in courts for determining the legality of captures on the sea; otherwise the juries would be pos-

sessed of the ultimate supreme power of executing the law of nations, in all cases of captures; and might at any time exercise the same in such manner as to prevent a possibility of being controlled; a construction which involves many inconveniencies and absurdities, destroys an essential part of the power of war and peace, intrusted to congress, and would disable the congress of the United States from giving satisfaction to foreign nations, complaining of a violation of neutralities, of treaties, or other breaches of the law of nations: and would enable a jury in any one state to involve the United States in hostilities: a construction, which for these, and many other reasons, is inadmissible.

That this power of controlling, by appeal, the several admiralty jurisdictions of the states, has hitherto been exercised by congress, by the medium of a committee of their own members.

Resolved, That the committee, before whom was determined the appeal from the court of admiralty, for the state of Pennsylvania, in the case of the sloop Active, was duly constituted and authorized to determine the same.

Resolved, That the said committee had competent jurisdiction to make thereon a final decree, and therefore their decree ought to be carried into execution.

Resolved, That the general assembly of the state of Pennsylvania be requested to appoint a committee to confer with a committee of congress, on the subject of the proceedings relative to the sloop Active, and the objections made to the execution of the decree of the committee on appeals, to the end that proper measures may be adopted for removing the said obstacles and that a committee of three be appointed to hold the said conference with the committee of the general assembly of Pennsylvania. The members chosen, Mr. Paca, Mr. Burke, and Mr. R. H. Lee.*

A copy of record,

CHAS. THOMPSON, Sec'y.

* Journals of Congress, vol. v. p. 85.

On the part of the general assembly of Pennsylvania, no measures of a conciliatory nature were adopted, in consequence of the request of congress, but on the contrary, they passed a resolution, on the 29th of November, 1779, empowering George Ross, esquire, judge of the admiralty, to pay over the amount of the sloop Active and cargo, and which amount was paid, viz.

To David Rittenhouse, esquire, then treasurer of the state of Pennsylvania.

To captain Houston, commander of the state brig Convention.

To the owners of the sloop Le Gerard, James Josiah commander.

The appellants Olmsted and others, being thus defeated in their appeal to the government of the United States, again had resort to the tribunals of the state of Pennsylvania, and a suit was instituted in the county of Lancaster, against the executors of George Ross, esquire, for the amount of the sales of the Active and cargo, and they obtained against them a judgment by default.

The consequence of this proceeding, was a suit in the name of Ross's executors, for the use of Olmsted and others, *v.* Rittenhouse; for the report of which case, I am indebted to to the reports of A. J. Dallas, esquire.*

Ross et al. Executors *v.* Rittenhouse.

In this cause a verdict was taken for the plaintiff, subject to the opinion of the court on a case stated. After argument, the judges recapitulated the facts and arguments of counsel, and delivered their opinions *seriatim* in the following terms:

M'Kean, chief justice: this case is, in brief, as follows: the British sloop Active had been captured as prize on the high seas, in September, 1778, and was brought into the port of Philadelphia, where she was libelled in the court of admi-

* 2 Dall. Rep. p. 160.

ralty of the state, held before George Ross, esq. the then judge, on the 18th day of the same month. The four persons, for whose use this action is brought, claimed the whole vessel and cargo, as their exclusive prize; but Thomas Houston, master of the brig Convention, a vessel of war belonging to the state of Pennsylvania, claimed a moiety for the states, himself, and crew; and James Josiah, master of the sloop Gerard, a private vessel of war, claimed for himself, owners, and crew, a fourth part, allowing a fourth for the four persons before named. *All the claimants were citizens of the United States.* The libels were tried by a jury, on the 15th of November, 1778, and a general verdict given, in the proportions above mentioned, which was confirmed by the sentence of the court. Gideon Olmsted and the other three persons, were American mariners on board the Active; they had risen upon the master, and confined him and the other mariners in the cabin, where a contest was kept up for the command of the vessel. The Convention and Gerard came up with her, and the question was, whether the four American mariners had subdued the rest of the crew before these vessels came in sight; that is, whether hostilities had then ceased? The jury were of opinion, they had not, and gave the verdict accordingly.

Gideon Olmsted and the three other mariners appealed from the sentence, to the court of appeals of the United States, which, on the 15th of December following, reversed the sentence of the judge of the admiralty, and decreed the whole to the appellants. The judge refused obedience to the decree of reversal, and paid a moiety of the net proceeds of the prize into the treasury of the state, taking a bond of indemnity from the defendant in this action, as treasurer of the state, upon which bond this action is brought. The executors of judge Ross, the obligee, having been previously sued in

the court of common pleas, for the county of Lancaster, in this state, for the money so paid, and judgment being obtained against them by default, without any knowledge of the defendant.

Thereupon several questions have been made, which may be stated as follows:

1st, Had the court of appeals jurisdiction to investigate facts, after a trial and general verdict by a jury, and to give a contrary decision, without the intervention of another jury?

2d, Had the court of common pleas of Lancaster county jurisdiction in the action by Olmsted and others, against the executors of the judge; or should not the decree of the court of appeals have been carried into execution by that court, or the court of admiralty, without the aid or interference of any common law court?

3d, Can an action be maintained on this bond, the condition whereof is virtually to disobey the court of appeals, and the laws of the land, if that court had of right a power to decide contrary to the general verdict of a jury? And, can the plaintiffs, without having defended, or given notice to the present defendant of the suit in the court of common pleas, support an action on this bond?

I conceive it proper to premise, that I took notice at the time this action was first brought to trial in this court, "that when the business was before the court of appeals of the United States, in December, 1778, I had the honour to be president of that court; but declined sitting on account of my connexion with this state as chief justice, and otherwise; and that the same reason still subsisted. That the next thing to giving a righteous judgment, was to endeavour to give general satisfaction; which circumstance might not probably be attained by our decision of the present controversy, both court and jury being in some measure interested, as they

were all citizens of Pennsylvania. For these reasons, I expressed a wish, that some mode might be adopted for trying the cause in the supreme court of the United States." This proposition was then assented to, and a juror withdrawn; but, it seems, our expectations have been disappointed, and we are obliged, at last, to decide the controversy.

To determine the first question, we must take into consideration the act of congress for erecting tribunals competent to determine the propriety of captures, passed the 25th November, 1775, the fourth section of which is in these words:

"That it be, and hereby is recommended, to the several legislatures in the United Colonies, as soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made aforesaid, *and to provide, that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient.*" The sixth section provides; "that in *all cases* an appeal shall be allowed to the congress, or to such person or persons as they shall appoint for the trial of appeals, &c."

The act of general assembly, passed the 9th of September, 1778, entitled "an act for establishing a court of admiralty," allows appeals from that court in all cases, unless from the determination or finding of the facts by the jury, which was to be without reexamination or appeal.

The congress on the 15th of January, 1780, resolved (*inter alia*) "that the trials in the court of appeals be according to the usage of nations, *and not by jury.*" This has been the *practice* in most nations, but the law of nations, or of nature and reason, is in arbitrary states enforced by the *royal* power, in others, by the *municipal law* of the country; which latter may, I conceive, facilitate or improve the execution of its

decisions, by any means they shall think best, provided the great universal law remains unaltered. Now, why may not a fact, respecting the capture from an enemy by citizens of the same state, and in which question no foreign nation, or person, is concerned, be determined by a jury, as well as in other cases? This mode of ascertaining a fact done on the high seas, to wit, who were the captors of a prize, when the contending parties are all citizens, or subjects of the same country, seems to be as reasonable, as in disputes about property, acquired on land. I confess, I do not see how the law of nations is counteracted, or infringed by it.

In England, if piracy was committed by a *subject*, it was held a species of treason, being contrary to his allegiance by the ancient common law; if by an *alien*, it was held to be felony. Formerly it was cognisable by the admiralty courts, which proceed by the rules of the civil law; but the statute 28 Henry 8. c. 15. established a new jurisdiction for this purpose, which proceeds according to the course of the common law. Here is a precedent of an act of parliament changing the common mode of trial in Europe, and introducing the trial by jury, which remains in force and practice to this day. If this can be done, where life is the stake, *a fortiori*, it may be done in matters of *meum et tuum*.

It then appearing to me, that the congress and legislature of Pennsylvania had power and authority to make the alteration, in the mode of trial of facts litigated between citizens, it remains to be inquired, whether the verdict in the present case was capable of reexamination by the court of appeals, without *another jury*. The genius and spirit of the common law of England, which is law in Pennsylvania, will not suffer a sentence or judgment of the lowest court, founded on a *general verdict*, to be controlled or reversed by the highest jurisdiction; unless for error in matter of law, apparent upon

the face of the record. 3 Blackst. 330. 379. 1 Wils. 55. This is enforced by the act of assembly of the 9th of September, 1778, in clear and express words, in the very case under consideration; which act was passed in compliance with the act of congress of the 25th November, 1775, and allows an appeal in all cases, unless from the verdict of a jury; having a reference to the subject matter, and meaning that the facts should not be reexamined, or appealed from; but that an appeal might be made notwithstanding, with respect to any error in matter of law. The advantage of *viva voce* evidence over written, in the investigation of truth, will hardly be controverted at this day in the United States; and the court of appeals had not the opportunity of seeing the witnesses on the trial, or of so well knowing the credit due to them, respectively, as the jury.

For these reasons, and others, which I shall omit for the sake of brevity, I am sorry to be obliged to say, that, in my judgment, the decree of the committee of appeals was contrary to the provisions of the act of congress, and of the general assembly, extrajudicial, erroneous and void. I am strengthened in this opinion by the true construction of the resolve of congress, of the 15th January, 1780, to wit, that the trials in the new court of appeals should be according to the usage of nations, and *not by jury;* which implies, that the court of appeals, prior to this, had, or ought to have, proceeded by jury trials. *Ad quæstionem facti non respondent judices, ad quæstionem juris non respondent juratores.* 1 Inst. 155. b.

As my opinion on the first question is in favour of the defendant, it will appear unnecessary to say any thing to the other points; but as they have been strongly insisted upon, I shall briefly notice one of them. It rather seems to me, that the appellants had no other way of obtaining the execu-

tion of the decree in their favour, but by the aid of the court of appeals, or of admiralty, and no court of common law has any jurisdiction in the case. Douglas 572. 3 Term Rep. 344. 4 Term Rep. 382. 400. 1 Dall. Rep. 221. 1 Wills. 211. And, also, that an action will not lie against a judge for what he does as such. Cro. Eliz. 80. 397. 1 Mod. 184. 185. 2 Mod. 218. 12 Mod. 388. 391. 1 Ld. Raym. 465. 2 Ld. Raym. 767. Salk. 397.

Shippen, justice. This is a suit brought on an obligation from the defendant to the plaintiffs' testator, for the sum of £22,000, on a special condition for the repayment and restitution of the sum of £11,496 9*s* 9*d*, paid by the said George Ross, the judge of the state court of admiralty, to the defendant, treasurer of the state of Pennsylvania, as the share and dividend of the said state, in and out of the prize sloop Active, according to the verdict of the jury on the trial of the same sloop, in the admiralty court of the said state, *in case* the said George Ross should thereafter, in due course of law, be compelled to pay the same according to the decree of the court of appeals in the case of the said sloop Active, and for the indemnification of the said George Ross, from all actions and demands, which might arise on account of his having paid the said money to the defendant.

As a foundation for the present suit, the plaintiffs produced a record of a recovery in Lancaster county against them, for the sum of £3248 4*s* 7*d* 1-4, at the suit of Gideon Olmsted, Artemas White, Aquila Rumsdale, and David Clarke, in an action of *assumpsit*, for money had and received by the testator George Ross, to the use of them the said Gideon Olmsted, and others. The judgment appears to have been taken by default, and the damages assessed by a jury of inquiry.

It is stated in the case, that the defendant had no notice of this recovery 'till after the final judgment. It, therefore,

seems to have been agreed, that whatever defence the defendant might have made, if he had been privy to that action, he may avail himself of in this. Two principal questions arise on the case.

1st, Whether the court of appeals of congress, were competent to decide the question of prize, and the consequent question, who were the captors to whom the prize should be adjudged, contrary to the verdict of the jury, in the state court of admiralty?

2d, Was the action of Olmsted, and others against the judge of the admiralty, for the money lodged in his court in consequence of his own decree, cognisable in the court of common pleas in Lancaster county?

As to the first question, I own I am not convinced, that the sovereign power of the nation, vested by the joint and common consent of the people and states of the union, with the exclusive rights of war and peace, and with the consequent, and necessary powers, of judging in the last resort of the legality of captures on the ocean, can, either in reason or sound law, be precluded from deciding an appeal, both of facts and law, arising in cases of prize, merely because they had recommended to the states to pass laws to establish courts of admiralty, for the trial of prize causes, in which the facts were, in the first instance, to be tried by jury, according to the course of the common law. 1st, Because, in the nature of things, and according to the course and practice of all civil law courts, all decisions in the courts in the last resort, *upon appeals*, are made upon a view and full consideration of both fact and law. 2d, Because, otherwise, appeals from the inferior courts would, in most cases, be vain and nugatory. 3d, Because, otherwise, no steady and uniform rules of decision could be established, and foreign nations could never know, or confide in, the grounds of our decisions;

and it does not appear to me material, that, in the present instance, all the parties were American citizens. And lastly, because, in the present case, congress has explicitly reserved the power of final decisions upon appeal *in all cases.*

As to the second question, whether an action is sustainable in the court of common pleas in behalf of Olmsted, and others, against the judge of the admiralty, for the money he distributed according to his own decree, I acknowledge I cannot discover any principle, or authority in law, upon which such an action can be supported. It is not now to be made a question, whether the courts of admiralty have not an exclusive jurisdiction over all questions of prize, or no prize; and also who are the captors of prizes, and how distribution shall be made; together with the power of enforcing their own decrees: The cases of Lindo *v.* Rodney, Le Caux *v.* Eden, and Camden *v.* Home, fully settle the point. The jurisdiction of the admiralty seems, likewise, to be *exclusive* in many cases, where the question of prize seems to be *at rest;* as where the admiralty has decided that a ship taken is *no prize*, *ex gratia*, in the case of a neutral vessel. In that case it is not competent for a common law court to sustain a suit for the illegal capture, but a new libel is exhibited in the admiralty, to compel the captors to account to the captured. 4 Term R. 385. So in the case of Le Caux *v.* Eden, an action for false imprisonment would not lie at common law, where the imprisonment was merely in consequence of taking a ship *as prize*, although the *ship had been acquitted.* I know of but one case, where the common law courts have sustained suits for money paid out of the court of admiralty, in consequence of a taking as prize; and that is, where the admiralty has fully liquidated all demands relating to the proceeds of a prize, and the money remains in the hands of the agents of the captors. In such cases, actions at law have been supported

against the agents; but it must be ascertained that these are the agents of the real captors; for, if any thing is left for the admiralty to settle, as if other persons not represented by the agents claim any part of the proceeds, there the courts of law will not interfere. And this was the case of Camden *v.* Home. 4 Term Rep. 382.

What is the case before us? A judge of an inferior court of admiralty condemns a prize, declares who are the captors, and orders a distribution accordingly. On appeal to the superior court of admiralty, that court reverses his judgment, and directs a different distribution. The judge below refuses to obey the sentence, and persists in distributing the proceeds of the prize agreeably to his own decree. A suit is brought here, to compel the judge to perform the decree of the superior court. Was the case, or question, of prize at rest, or was there not something now to be done by the superior court to enforce the sentence? Can ours be a proper court to decide between the sentences of two contending courts of admiralty, or to enforce the sentence of either? It is in vain to say, the times were such, that the supreme court could not, or would not, proceed to extremities with the judge of the inferior court. We are not authorized to aid a defective, or unwilling jurisdiction, by assuming an extraordinary power, unknown to the law. Can a judge, in the execution of his own judgment, although contrary to that of a superior court, be considered as in the situation of an agent receiving the money of his constituents? Or, if by any strained construction he could be called the agent of those in *whose favour* he decrees, can he be sued as the agent of those *against whom* he decrees? In whatever light I view this question, I am satisfied, that the court of common pleas were incompetent to carry into effect the decree of the reversal of the superior court of appeals, and that an action for money, had

and received, against the judge, who distributed the money according to his own decree, could not be sustained in a court of law.

YATES, justice. On the statement of facts in this case, three points have occurred.

1st, Whether the court of appeals of the United States had jurisdiction in the case of the sloop Active?

2d, Whether the court of common pleas, at Lancaster, had jurisdiction in the action by Gideon Olmsted, and others, against the now plaintiffs?

3d, Whether the plaintiffs are damnified, so as to warrant the present proceedings, under all the circumstances of the case?

I will consider the different points, inversedly.

On the 3d, point, I am satisfied by the authorities cited by the plaintiffs' counsel, that there is sufficient proof of a damnification, to warrant the suit in a common case. The non-payment of money at the day, is a forfeiture of a counter bond. 1 Vent. 261. Cro. El. 672. Putting the obligee in danger of being arrested is a damnification. 3 Bulst. 233. 5 Co. 25. Cro. Jac. 340.

It was admitted, indeed, on the last argument, that the proceedings at Lancaster should be considered as evidence of a damnification; but that the defendant should be let into a full defence in this action. No notice having been given to this defendant of the institution of the suit against the now plaintiff, he is not stopped from saying, that they were not bound in the former action, to pay the money.

On the second point, it has been insisted by the defendant's counsel, that the courts of admiralty having exclusive jurisdiction in cases of prize and their consequences, the common pleas at Lancaster could have had no cognisance of the action commenced by Gideon Olmsted, and others.

In the famous case of Le Caux *v.* Eden, Willes, justice, says: " Where the injury is the necessary and natural consequence of the capture, the court of admiralty has the sole and exclusive jurisdiction." Doug. 579. Ashhurst, justice, observes; " where the admiralty has jurisdiction of the original matter, it ought also to have jurisdiction of every thing necessarily incidental." Id. 580. Buller, justice, in a very elaborate argument infers from all the adjudged cases, " that the admiralty has a jurisdiction on the question of *prize or not prize*, and its consequences, and that the common law courts have none." Id. 587. 590. And in Smart & Wolff, the words of judge Buller, are; " every case that I know on the subject, is a clear authority to show, that questions of prize and their consequences are solely and exclusively of the admiralty jurisdiction." 3 Term Rep. 344.

In Lord Camden et al. *v.* Home, it is adjudged, that the prize courts, and courts of commissioners of appeal, have the sole and exclusive jurisdiction of the question of prize and no prize, and who are the captors. 4 Term Rep. 382.

In Done's administratrix *v.* Penhallow, and in 1 Dall. Rep. 221. Mr. President expresses himself thus: In this cause, " the validity of the sentence of the court of appeals is disputed. If we say, it is valid, we, in effect, say, the brigantine is no prize; if otherwise, we say she was a prize. We have clearly no authority to say either the one or the other." And again; " this is an action to carry into execution the sentence of the court of appeals, which we have no authority to do, that being the proper judicature to carry into effect its own sentences."

These adjudications militate strongly against the jurisdiction of the court of common pleas of Lancaster county. The cause of action there, was " the immediate and necessary consequence of the vessel's being taken as a prize." 1 Dall.

Rep. 221. It was, in short, a demand instituted by the plaintiffs, as sole captors of the sloop Active.

But it has been contended by the plaintiffs' counsel, that here all parties affirm the same thing, to wit, that the sloop was a prize, and *that* question cannot now possibly arise; which is said to distinguish it from the several cases cited. And for this purpose, Henderson *v.* Clarkson, determined in this court, is quoted; where the court held, that an agent for seamen might recover at common law the prize money, due under the decree of the court of admiralty of Pennsylvania.

I find from my notes, that the circumstances were as follow: The plaintiff was appointed agent for forty-three seamen, on board the privateer brig Holker, to receive their prize money. The defendant was marshal of the court of admiralty of Pennsylvania, where two of the prizes were libelled, condemned, and sold. The plaintiff, on the 27th December, 1781, gave a bond to the commonwealth in £250 penalty, conditioned to account faithfully with the seamen, and to pay over the shares unclaimed, within one year, to the use of the corporation of contributors to the Pennsylvania hospital. The judge of the admiralty, on that day, also, issued a writ to the defendants, to deliver over the goods and money due to the owners and seamen, or their agents, on the different prizes; to which he made return, that the goods and money were ready to be delivered over. That suit was brought to recover the prize money due to the plaintiff's constituents: the marshal had paid a considerable part, and rendered his account, but some of the items therein were disputed. The court on full argument resolved, that the agent might, as a common head or centre for the captors, and hospital, under the right acquired by the act of assembly, of the 8th of March and 22d September, 1780, institute

a suit in his own name, as the captors themselves might have done; and as the question respecting "prize or no prize" could not come into controversy, he might recover the money due to them, by the admiralty decree; they having a vested interest therein, under the acts of congress, and the legislature. The marshal had returned to the judge, that he had the goods and money ready to be delivered to the captors, or their agent; and this was held to amount to a written promise, to pay the same to the plaintiff, Henderson, as agent of the seamen.

The two cases are not analogous; they possess distinct prominent features: in the former case, there was no question, who were the captors, or how the booty was to be divided; there were no discordant decrees of different marine courts; no dispute respecting the constitutional powers of the judicature, which pronounced the final decree.

Here they all fully exist; and a common law court at Lancaster, was called on to carry into execution the decree of the court of appeals, against the executors of the state judge, and in derogation of the decree he had given, sanctioned by the verdict of a jury.

On the *first* point, it is not essentially necessary to give an opinion, whether, if the resolve of congress had been *absolute* and *imperative*, instead of being barely *recommendatory*, as to the establishment of courts of admiralty in the different states, and the laws of any one state had been repugnant thereto, such resolution would be supreme, and control the law of the individual state: nor shall I attempt to define the former powers of congress, by fixing how far they reached, *anterior* to the confederation; which was sent to the different states for ratification on the 17th November, 1777, and finally acceded to by Maryland on the 1st of March, 1781. I am, however, compelled to say, that the powers of congress must

necessarily be supposed to have been coextensive with the great objects which America then had in view, and competent to protect and advance the united interests of the whole. It is sufficient in my idea, for the decision of the case before us, to observe, that the present suit resting on the judgment in Lancaster county as its basis, if the then plaintiffs were not legally entitled to recover against the executors of Mr. George Ross, the action now before the court is not sustainable. 3 Term Rep. 377. I have only to add, that it would also have afforded me much pleasure, if this argument had been conducted before the judges of the supreme court of the United States. We formerly indulged ourselves with hopes of it, when the jury were discharged in an action between the now plaintiffs and Thomas Leaming, in January term last, when the same points came in question. We may be considered, in some remote degree, as parties in the present suit, and the decision of the federal judges would probably have given more general satisfaction. But the parties have insisted on our opinion; and we are bound to give it. On the best consideration, therefore, that I have been able to bestow on the subject, I find myself constrained to give my voice, that judgment be rendered for the defendant.

After the establishment of the present constitution of the United States, it was considered that the courts of the United States, established under the constitution, had all the rights and powers vested in the commissioners of appeals.

In the year 1795, the case of Penhallow, et al. vs. Doane, administratrix, (3 Dal. Rep. 54.) was brought before the supreme court of the United States, and among other important and contested points, it was decided; that the district courts of the United States have power and authority to carry into execution the decrees of the court of appeals, ap-

pointed by congress, under the former confederation. In 1802, Messrs. Olmsted and others, finding all expectations of success in efforts to obtain that justice they considered themselves entitled to defeated, from the state of Pennsylvania, determined to avail themselves of this decision of the supreme court of the United States, and brought their claim before the district court of the United States, for the Pennsylvania district, by filing the following libel, &c.

To the honourable Richard Peters, Judge of the District Court of the United States, for the Pennsylvania district.

Gideon Olmsted, Artemas White, Aquila Rumsdale, and David Clarke, in all humble manner complaining, show:

That at the days and times herein after mentioned, and for a long time before, they were, ever since have been, and still are citizens and inhabitants of the state of Connecticut; and that the said Gideon, Artemas, Aquila and David were, during the late war between his Britannic majesty and the United States of America, taken as prisoners of war, by the subjects of his said Britannic majesty, bearing military commissions and acting under his authority, and carried into the island of Jamaica, where they were on or about the first day of August, in the year of our Lord, one thousand seven hundred and seventy eight, placed on board a certain sloop or vessel, called the Active, belonging to the subjects of his said Britannic Majesty, and laden with a cargo of goods, wares, and merchandise, belonging to the subjects of the same king, to assist in navigating the said sloop or vessel called the Active, with the said cargo from Jamaica aforesaid to New York, then in possession of the fleets and armies of the said king, for the use of the said fleets and armies. That in making the said voyage, on board the said sloop, with her said cargo, your libellants on or about the sixth day of September,

in the year aforesaid, on the high seas, and within the jurisdiction of this honourable court, as well with an intent to prevent the said cargo, consisting of provisions and other supplies, from being furnished to the said fleets and armies as to escape from captivity and to return to their homes, with the said sloop and cargo, rose upon captain Underwood, master of the said sloop Active, and confined him, his mate and crew, in the cabin of the said sloop, assumed and took upon themselves the sole command and direction of the said sloop and cargo, and with the same sloop and cargo, and the said captain, mate and crew, so subjected and confined, did proceed for and toward the port of Egg-Harbour, in the state of New Jersey, until the eighth day of the said month of September; upon being within sight of the said port, with the said sloop and cargo, captain, mate and crew, under their authority and direction, they were discovered, pursued, fired upon, and together with the said sloop and cargo, forcibly and illegally taken possession of by captain Thomas Houston, commander of the armed brigantine Convention, belonging to the state of Pennsylvania, his officers, marines, and seamen, and on or about the fifteenth day of the said month of September, brought into the port of Philadelphia, within the jurisdiction of this court; that thereupon, the said captain Thomas Houston exhibited and filed a libel in the admiralty court of Pennsylvania, as well in behalf of himself, his officers, mariners, and seamen, as of the state of Pennsylvania, against the said sloop Active, her tackle, apparel, furniture, and cargo, claiming the same as their lawful prize, and booty of war by them taken, from the enemies of the said United States, and liable to confiscation as such to the use of them and of the said state of Pennsylvania; that thereupon, captain James Josiah, commander of the private armed sloop of war Le Gerard, appeared in the said court of admiralty, and on

behalf of himself, his officers, marines, and seamen, belonging to the said privateer and of the owners thereof, exhibited and filed in the same cause a claim to certain shares and proportions of the said sloop Active, her tackle, apparel, furniture and cargo, as having been taken by the said privateer and state brig together and as consorts. That your libellants also exhibited and filed in the same court and in the same cause their claim and allegations aforesaid, against the said sloop, her tackle, apparel, and furniture, and cargo, praying that for the causes already mentioned, the same might be condemned as lawful prize and booty of war, for their exclusive use and benefit, and that the libel filed by the said captain Houston and the claim filed by the said captain Josiah might be dismissed; and it was so proceeded in the said cause, that by the final sentence and decree of the said court, pronounced on the fifth of November, in the year of our Lord one thousand seven hundred and seventy eight, the said sloop, her tackle, apparel, furniture and cargo were adjudged and condemned as lawful prize and booty of war, for the use and benefit of your libellants, as to one fourth-part thereof, and as to the remaining three fourth-parts thereof for the use and benefit of the said captain Josiah, his officers, marines and seamen belonging to the said privateer Le Gerard, and the owners of the said privateer and of the said captain Thomas Houston his officers marines and seamen belonging to the said armed brigantine the Convention and of the state of Pennsylvania to whom the said brigantine belonged; that your libellants duly appealed from the said sentence and decree to the honourable the court of commissioners of appeals in prize causes for the United States of America, and gave security in due form of law, to prosecute the said appeal to effect; and it was so proceeded in the said appeal before the said commissioners of appeal, that by

a final sentence and decree therein duly had and pronounced on the fifteenth day of December in the year aforesaid, it was adjudged and ordered that the judgment or sentence aforesaid of the court of admiralty in the cause aforesaid be in all its parts revoked, reversed and annulled, and that the said sloop or vessel called the Active, with her tackle, apparel and furniture, and the goods, wares and merchandise laden and found on board her at the time of her capture, as mentioned in the claim and answer of the said Gideon Olmsted Artemas White, Aquila Rumsdale and David Clarke the appellants (and who are the libellants in this cause), be condemned as lawful prize to and for the use and behoof of them the said appellants; and it was further ordered by the said judgment and decree, that the marshal of the said court of admiralty should sell the said sloop Active and her cargo at public vendue for the highest price that could be gotten for the same, and after deducting the costs and charges of the trial in the said court of admiralty, and the expenses attending the sale of the said sloop &c. he should pay the residue of the said moneys arising from the said sale, unto the appellants aforesaid their agent or attorney; all of which sufficiently appear by the minutes, records and proceedings of the said court of admiralty, and of the said commissioners of appeals in the cause maritime and appeal aforesaid; certified copies of all which minutes, records and proceedings your libellants bring here into court, and pray that they may be received as exhibits in this cause, and deemed and taken as part of this their libel; and your libellants further state and show that Matthew Clarkson, esquire, late marshal of the state of Pennsylvania now deceased, was marshal of the said court of admiralty during all the time aforesaid, and as such and by virtue of the process in due form of law, for that purpose issued from the said court of admiralty and to him

directed took possession of and received into his custody the said sloop her tackle, apparel, furniture, and cargo of the value of one hundred thousand Mexican dollars immediately upon the arrival of the same sloop, her tackle, apparel, furniture and cargo at the port aforesaid, to wit, on or about the fifteenth of September, in the year aforesaid, to wit, upon the high seas and within the jurisdiction aforesaid. And that the said marshal afterwards to wit, on or about the sixteenth of the same month of September in the said year at the port aforesaid and within the jurisdiction of this court by virtue of the decree and order aforesaid, of the said court of admiralty exposed the said sloop with the said tackle, apparel, furniture and cargo to sale at public vendue, and sold the same for divers large sums of money, amounting in the whole to sixty thousand pounds lawful money of Pennsylvania, by him in hand then and there received for the same; and afterwards to wit, on the same day and year at the port aforesaid, and within the jurisdiction aforesaid, loaned the said sum of sixty thousand pounds to the said United States, and then and there received from the said United States divers loan office certificates of the said United States for the said last mentioned sum of money, and to the full amount thereof according to an account thereof mentioned in a schedule hereto annexed (and which they pray may be considered as a part of this their bill*) in behalf of and in trust to and for the use of the said Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke, and the same certificates then and there brought into the said court of admiralty and deposited the same therein in behalf of and in trust to and for the use aforesaid. And these libellants further show that afterwards to wit on the same day and year aforesaid at the port aforesaid, and within the jurisdiction aforesaid, divers of the certificates amounting to the sum of fifteen thousand pounds

* The schedule is omitted here as unimportant.

lawful money aforesaid were received by and come to the hands and possession of David Rittenhouse, esquire, now deceased, in trust to and for the use of the said Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke; and that he the said David Rittenhouse, afterwards in his life time, to wit, on the twenty-first day of February, in the year of our Lord one thousand seven hundred and ninety-three, at the district aforesaid, within the jurisdiction aforesaid, caused the said last mentioned certificates to be so exchanged, reexchanged and funded for the use and benefit aforesaid, as that he received in lieu of, and on account thereof and for the use and benefit aforesaid, divers other loan office certificates of the United States to the amount of ten thousand dollars, lawful money of the United States, and also the sum of ten thousand dollars of the same United States, according to a schedule thereof, hereto annexed, which they pray may be considered as a part of this bill; and afterwards made his testament and last will in writing, duly made and executed, and thereof and thereby appointed Hannah Rittenhouse, Elizabeth Sergeant and Esther Waters executrixes thereof, and died; and after his death the said last mentioned moneys and certificates came to the hands and possession of the said Elizabeth Sergeant and Esther Waters, executrixes aforesaid, who survived the said Hannah Rittenhouse since deceased, and who have and hold the same together with several large sums of money amounting to five thousand dollars, being the moneys received by the said David Rittenhouse in his lifetime, and since his death by his surviving executrixes for the interest due on the said last mentioned certificates.

Wherefore your libellants pray that the process of this honourable court may issue to cite and admonish the said Elizabeth Sergeant and Esther Waters, executrixes aforesaid, so that they be and appear before this honourable court at the next court day to answer to your libellants in the premi-

ses and that they then and there produce to the same court a full and exact account of all moneys, certificates, indents and documents of moneys or debts received by the said David Rittenhouse in his lifetime and by them the said Elizabeth and Esther since the death of the said David Rittenhouse, arising from the sales aforesaid and from all such exchanges and reexchanges, loans and funding, as aforesaid, and of all such moneys as remain due thereon; and that they then and there also produce all such moneys, certificates, indents and documents as aforesaid as are in their hands, power, possession or under their direction or control, arising from all or any of the causes aforesaid; and that they finally abide by the future order and direction of this honourable court touching the same, the disposition thereof and all and singular the premises.

W. LEWIS, *pro lib.*

May 27, 1802.

To the honourable Richard Peters esquire, judge of the district court of the United States, for the district of Pennsylvania.

The answer of Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse deceased, to the libel of Gideon Olmsted, Artemas White, Aquila Rumsdale and David Clarke, respectively, showeth,

That your respondents are entirely ignorant of the several matters and things alleged and set forth in the said libel touching the capture of them the said libellants as prisoners of war by the subjects of his Britannic majesty during the late war between the United States of America and his said Britannic majesty, and touching the capture by them the said libellants of a certain sloop and her cargo, as stated in the said libel, the property of the subjects of his said Britannic majesty, and also respecting the several disputes about the said sloop and her

cargo, which have existed between them the said libellants, and the several other persons mentioned in the said libel and how the said several disputes and claims were afterwards proceeded upon, and what decrees were therefore made in the several courts mentioned in the said libel except so far as the same appear from the several records referred to in the said libel.

But your respondents for answer to so much of the said libel as is material for them to answer unto say, That on the first day of May, in the year of our Lord one thousand seven hundred and seventy-nine, your respondents' testate David Rittenhouse, then being treasurer of the state of Pennsylvania, received from George Ross, esquire, judge of the admiralty in and for the state of Pennsylvania, for the use of the said state of Pennsylvania, the several loan office certificates mentioned in the schedule annexed to the said libel, being the share or dividend of the said state in the right of the brig Convention, in and out of the sloop Active, according to the verdict of the jury on the trial of the said sloop Active, in the admiralty court of the said state. That at the time of receiving the said certificates your respondents' testator gave to the said George Ross his obligation bearing date the same day and year aforesaid, in the penal sum of twenty-two thousand pounds money of Pennsylvania; the condition of which said obligation, reciting "that the said George Ross had the day of the date thereof paid to the said David Rittenhouse, treasurer of the state of Pennsylvania, for the use of the said state, the sum of eleven thousand four hundred and ninety-six pounds nine shillings and nine pence, being the share or dividend of the said state in right of the brig Convention, in and out of the sloop Active, according to the verdict of the jury on the trial of the said sloop Active in the admiralty court of this state," is such, "that if

the said David Rittenhouse shall make repayment and restitution of the said sum of eleven thousand four hundred and ninety-six pounds nine shillings and nine pence unto the said George Ross, his executors or administrators, in case he the said George Ross shall hereafter by due course of law be compelled to pay the same according to the decree of the court of appeals in the case of the said sloop Active; and if he the said David Rittenhouse shall and do in all things well and truly save harmless and indemnify, at all times hereafter, the said George Ross, his heirs, executors and administrators, and his and their lands and tenements, goods and chattels, of and from all damages, actions and demands which may arise or happen for or on account of his having paid the money aforesaid, then the above obligation to be void, or else to be and remain in full force and virtue," as by reference to a copy of the said bond hereto annexed, (which your respondents pray may be considered as a part of this their answer) will more fully appear—Your respondents beg leave further to state that the said David Rittenhouse afterwards, to wit, on the twenty-first day of February, one thousand seven hundred and ninety-three, caused the said certificates to be funded for the benefit of those who might eventually appear to be entitled to them, and received in lieu and on account thereof, and for the benefit and use aforesaid, three other certificates of United States debts; the first for three thousand three hundred and seventeen dollars thirty cents to carry interest at the rate of six per cent. per annum from the first day of January one thousand seven hundred and ninety-one; the second for three thousand and twenty-seven dollars eighty-eight cents, to carry interest at the rate of three per cent. per annum from the same time; and the third, for one thousand six hundred and fifty eight dollars, sixty five cents deferred stock, to carry interest at the rate of six per cent. per annum, from the

first day of January, one thousand eight hundred and one, being the same certificates mentioned in the schedule annexed to the said libel, and therein referred to. That true it is, as stated in the said libel, that the said David Rittenhouse made his testament and last will, and thereof and thereby appointed your respondents, together with Hannah Rittenhouse, who has since deceased, executrixes, and died; and that after his death and the death of the said Hannah, the said last mentioned certificates came to and have since remained in the hands and possession of your respondents, together with a large sum of money, received by the said David Rittenhouse, for interest of the said certificates; that your respondents have, since the death of the said David Rittenhouse, received the interest of the said certificates and the two per cent. principal directed by law to be paid annually, up to the first of January, one thousand eight hundred and two, inclusive, amounting with the interest received, by the said David Rittenhouse in his lifetime, to the sum of three thousand eight hundred and ten dollars, seventeen cents; all which has been regularly deposited, as received, in the bank of North America, and there remains for the benefit of those concerned. Your respondents beg leave further to state, that in pursuance of an act of the general assembly of the commonwealth of Pennsylvania, passed the 26th February, 1801, authorizing him so to do, Abraham Carpenter, esquire, the present treasurer of the said commonwealth, some time in the last fall, called upon these respondents and required them to deliver to him the said last mentioned certificates and the interest thereupon received, upon his giving them a bond of indemnity; but these respondents being advised, that they could not with safety deliver them to Mr. Carpenter, declined complying with his requisition. And your respondents beg leave further to state, that the above, together with the several papers herein referred to and hereto annexed, is a full

and exact account, to the best of their knowledge and belief, of all moneys, certificates, indents and documents, or moneys or debts, received by the said David Rittenhouse, in his lifetime, or by these respondents, since his death, arising from the sale of the said sloop Active and cargo, and from the exchange and funding aforesaid; and they humbly pray, that your honour will take the several matters and things stated in the said libel and in this answer, into your consideration, and make such order and give such directions touching the said certificates and the moneys received thereon, which your respondents bring here into this honourable court, as may appertain to justice, between the said claimants, and may keep your respondents from future trouble, molestation or damage, on account of the premises.*

ELIZABETH SERGEANT.
ESTHER WATERS.

July 12th, 1802.

* Copy of bond referred to within:

Know all men by these presents, That I David Rittenhouse, of the city of Philadelphia, gentleman, am held and firmly bound unto the honourable George Ross, esquire, judge of the admiralty, in and for the state of Pennsylvania, in the sum of twenty two thousand pounds, money of Pennsylvania, to be paid to the said George Ross, his certain attorney, executors, administrators, or assigns, to which payment well and truly to be made, I do bind myself, my heirs, executors and administrators, and every of them, firmly by these presents, sealed with my seal, dated the 1st day of May, 1779.

Whereas, the said George Ross hath this day paid to the said David Rittenhouse, treasurer of the state of Pennsylvania, for the use of the said state, the sum of eleven thousand four hundred and ninety six pounds, nine shillings and nine pence, being the share or dividend of the said state, in right of the brig Convention, in and out of the sloop Active, according to the verdict of the jury, on the trial of the said sloop Active, in the admiralty court of this state. Now the condition of the above written obligation is such, that if the said David Rittenhouse, shall make repayment and restitution of the said sum of eleven thousand four hundred and ninety six pounds, nine shillings and nine pence, unto the said George

To this answer a general replication was filed by Mr. Lewis for the libellants on the 15th of July 1802; and on the 14th of January 1803, the district judge made the following decree:

Gideon Olmsted, Artemas White, Aquila Rumsdale, and David Clarke *v.* Elizabeth Sergeant, and Esther Waters, surviving executrixes of David Rittenhouse esq. deceased.	In the district court of the United States, in and for the Pennsylvania district.

This is the long depending case of the sloop Active and cargo. It comes before me by libel filed against the executors of the late Mr. Rittenhouse, who received from George Ross esq. then judge of the state court of admiralty the sums mentioned in the libel, which were invested in the certificates of stock as stated therein. Mr. Rittenhouse on receiving these certificates, which were proceeds of the sales of the said sloop and cargo, gave a bond of indemnity to Mr. Ross, which is now offered, when payment of these proceeds is made, to be delivered up. The suit is instituted for the purpose of carrying into effect a decree of the court of appeals established under the old confederation; a copy whereof appears among the exhibits.*

Ross, his executors or administrators, in case he the said George Ross, shall hereafter by due course of law, be compelled to pay the same according to the decree of the court of appeals, in the case of the said sloop Active, and if he the said David Rittenhouse, shall and do in all things well and truly save harmless and indemnify at all times hereafter, the said George Ross, his heirs, executors and administrators, and his and their lands and tenements, goods and chattels, of and from all damages, actions and demands, which may arise or happen, for or on account of his having paid the money aforesaid, then the above obligation to be void or else to be and remain in full force and virtue.

DAVID RITTENHOUSE, (L. S.)

Sealed and delivered
in the presence of us.

* See ante, p. 31.

In the answer it is alleged that the moneys were received for the state of Pennsylvania.

In the replication this is denied. In a memorandum made by Mr. Rittenhouse at the foot of the account exhibited, it appears that he intended to pay over these proceeds to the state when indemnified.*

No such payment ever has been made; and the certificates and moneys are yet in the hands of the respondents.

It appears to me that Mr. Rittenhouse considered himself, as I conceive he was, a stakeholder, liable to pay over the deposit to those lawfully entitled thereto. His executors conceived themselves in the same predicament and have declined paying over the certificates and interest.

No counsel have appeared and requested to be heard on the part of the respondents; and I am left to judge from the libel, answer, replication and exhibits, which contain the state of the facts. If I should be thought mistaken in the opinion I form on the subject, there is time and opportunity to appeal to a superior tribunal.

I throw out of the case all circumstances not immediately within my present view of the duty I have to perform. I have nothing to do with the original question that has been decided by the court of appeals; nor does it appear to me essential, for me to determine with what intentions Mr. Rittenhouse received the certificates. The facts of the certificates and interest being now in the hands of the respondents is granted by them in their answer. It has been determined by the supreme court of the United States that this court has power to effectuate the decrees of the late court of appeals in prize causes;

* The memorandum is in these words "Note. The above certificates will be the property of the state of Pennsylvania when the state releases me from the bond I gave in 1778 to indemnify George Ross esq. judge of the admiralty for paying the 50 original certificates into the state treasury as the state's share of the prize"

and this court has on several occasions practised agreeably to that decision. There is no doubt in my mind (the authorities in the books being clear on this point) that the process and jurisdiction of this court will reach and extend over the proceeds of all ships, goods and articles taken as lawful prize, found within the district and legally proceeded against therein. These proceeds are under the same legal disposition and subject to the same responsibility under whatever shape they may appear as the original *thing* from which they were produced. It is conceded that the certificates and moneys in question are proceeds of the sloop and cargo in the libel mentioned. These were decreed to the libellants by judgment of the late court of appeals. I am therefore of opinion and accordingly decree and finally adjudge and determine that the certificates be transferred and delivered and the interest moneys paid over by the respondents to the libellants in execution of the judgment and decree of the court of appeals as stated in the proceedings in this cause with costs. I make it however a condition that the bond of indemnity be cancelled or delivered to the respondents on their compliance with this decree.

RICHARD PETERS.

January, 14th 1803.

After the decree of the district court in favour of the libellants Olmsted and others, it does not appear, from the records of the court, that any application to enforce the decree was made until the year 1807. In the interval Mr. Olmsted who had centered in himself the claims of all the libellants, had ineffectually applied to the legislature of Pennsylvania for relief—Disappointed in this effort, and about to resort to compulsory measures against the respondents, the following suggestion was filed by their attorney on the 29th of May 1807.

Gideon Olmsted and others, *v.* Elizabeth Sergeant and Esther Waters surviving executors of David Rittenhouse esquire deceased.	In the district court of the United States in and for the Pennsylvania district.

The twenty-ninth day of May A. D. 1807, the defendants, by John Sergeant their attorney, respectfully suggest to this honourable court that after the making of the decree in this case, to wit, in the second day of April A. D. 1803, the general assembly of the commonwealth of Pennsylvania, passed an act which was then approved by the governor of the said commonwealth in the following words, (prout the act.)*

* On the 31st of January, 1803, the governor of Pennsylvania, Mr. M'Kean, sent a message to the legislature, then in session, on the subject of the decree of the district court in this case. Were it within the province of the editor of this collection, he would here most willingly enter into an examination of the principles and statements assumed in this message, and the act of assembly which followed it. But he has prescribed to himself on this occasion a humbler task, that of recording the documents and authentic papers of this case. He cannot however, refrain from the remark, that all these statements and the principles, asserted by the governor and the legislature, are fully corrected and refuted by the proceedings in the case now published, by the decree of the district judge, and by the opinion of the supreme court of the United States, which will be found in a subsequent part of this collection.

The part of the governor's message, referring to this case, is in these terms,

"The secretary will, at the same time, present you with copies of a sentence or decree of the honourable *Richard Peters*, esquire, judge of the district court of the United States, in and for the district of Pennsylvania, in a cause wherein *Gideon Olmsted*, and others are libellants, against the surviving executrixes of the late *David Rittenhouse*, esquire, deceased, respondents.

"Having had knowledge of the cause, and all the circumstances attending it, twenty four years ago, I cannot, in duty to the commonwealth,

That they the defendants, being required by proper authority to pay into the treasury of the said commonwealth the moneys admitted to have been received as executrixes of

silently acquiesce in some of the former or late proceedings therein. By the ingenuity exercised in this business, "an act of congress," "an act of the general assembly of the state," and "a verdict of a jury," are held for nought: by a strained construction, the treasurer of the state is converted into a stakeholder, and a sentence given in favour of the libellants, without any summons, notice to, or hearing of the commonwealth of Pennsylvania, the other only real party, whose interest may be thereby affected to the amount of near 15,000 dollars.

"The commonwealth, not being made a party to the suit, cannot sustain an appeal to the supreme court of the United States, and resistance would be extremely disagreeable, though the whole process should be held as *coram non judice*, which must be the case, if it had been made a party; (for, by an amendment of the constitution of the United States, of the 21st December, 1793, it is declared, "that the judicial power of the United States, shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another state, or by citizens or subjects of any foreign state,") and as this decree has been passed during the session of the general assembly, *to wit*, on the 14th of the present month, I have conceived it my duty to lay the affair before you, for advice and direction.

"The whole transaction will be satisfactorily understood by a reference to *Dallas's Reports*, vol. 2, p. 160, and to the decree itself."

On the 2d of April, 1803, the legislature passed the following law.

"An act relating to the claim of this commonwealth, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse, esquire, deceased.

"Whereas by an act of congress for the erecting of tribunals, competent to determine the propriety of captures during the late war between Great Britain and her then colonies, passed the twenty-fifth day of November, one thousand seven hundred and seventy-five,* it is enacted in the fourth section thereof as follows, viz. "That it be and is hereby recommended to the several legislatures in the United Colonies, as

* *Figures* in the original.

David Rittenhouse esquire, in manner aforesaid, did on the 19th day of July 1803, transfer to the treasurer of the commonwealth, the certificates of stock above mentioned, and

soon as possible, to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made aforesaid, and to provide that all trials in such case be had by a jury, under such qualifications as to the respective legislatures shall seem expedient;" and in the sixth section thereof as follows, viz. "That in all cases an appeal shall be allowed to the congress, or to such person or persons as they shall appoint, for the trial of appeals:" and whereas by an act of the general assembly of Pennsylvania, passed the ninth day of September, one thousand seven hundred and seventy-eight, entitled "an act for establishing a court of admiralty," appeals were allowed from the said court in all cases, unless from the determination or finding of the facts by a jury, which was under the provisions of that law, to be without reexamination or appeal: and whereas by a resolution of congress, of the fifteenth day of January, one thousand seven hundred and eighty, it was among other things declared, that trials in the court of appeals should be according to the law of nations and not by jury: and whereas the British sloop Active, having been captured as prize on the high seas, in the month of September, one thousand seven hundred and seventy-eight, and brought into the port of Philadelphia, and there libelled in the court of admiralty of the said state, held before George Ross, esquire, the then judge of the said court, on the eighteenth day of the said month of September: and whereas the libellants then and there against the said sloop Active, were Gideon Urmstead or Olmstead, Artimus White, Aquila Rumsdale and David Clarke, who claimed the whole vessel and cargo as their exclusive prize: Thomas Houston, master of the brig Convention, a vessel of war belonging to Pennsylvania, who claimed a moiety of the said prize for the state of Pennsylvania, himself and his crew; and James Josiah, master of the sloop Girard,* private vessel of war, who claimed one fourth-part of the said prize for himself, his owners and crew: and whereas all the facts respecting the said capture being submitted to the said court of admiralty, and a jury then and there returned, impanelled and sworn, a general verdict was brought in by the said jury, which was confirmed by the court, whereby Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clark, became entitled to one fourth of the said prize; Thomas Houston, for himself and crew became entitled to another fourth; the state of Pennsylvania as owner of the vessel of war the Convention, to another fourth; and James Josiah for himself and own-

* *Gerard* in the original.

on the 29th July 1803, pay into the treasury of the commonwealth the moneys by them received as aforesaid in obedience to the said act of the general assembly, and to the requisition made under it.

ers, and crew of the sloop Girard, become entitled to the remaining one fourth part of the said prize: and whereas the said Gideon Olmstead, Artimus White, Aquila Rumsdale, and David Clarke, being dissatisfied with the verdict and sentence aforesaid, did appeal from the said court of admiralty of Pennsylvania, unto the court or committee of appeals appointed as aforesaid, under the authority of congress, notwithstanding the recommendation of congress aforesaid, of the twenty-fifth day of November, one thousand seven hundred and seventy-five, for the appointment of courts of admiralty in each of the then United Colonies, did expressly provide that all trials respecting capture should be had by a jury, and under such qualifications as to the respective legislatures should seem expedient, and notwithstanding the court of appeals did decide not by a jury, but by the usage of nations, and notwithstanding the law for establishing the court of admiralty of Pennsylvania, did expressly take away the right of appeal, where the facts were found and determined by the intervention of a jury, and notwithstanding this state was authorized at the time to make such qualification or provision, taking away the right of appeal in jury cases, by virtue of the recommendation of congress aforesaid, which allowed and recommended the said courts of admiralty to be established with a jury, under such qualifications as to the respective legislatures should seem expedient: and whereas the said court of appeals of the United States, on the fifteenth day of December, one thousand seven hundred and seventy-eight, did reverse the sentence of the court of admiralty aforesaid, and did decree the whole of the said prize to the appellants: and whereas the judge of the court of admiralty to wit, George Ross aforesaid, did refuse obedience to the decree of reversal, and did direct Matthew Clarkson, then marshal of the said court, to pay part of the proceeds of the said prize, to the amount of eleven thousand four hundred and ninety-six pounds, nine shillings and nine pence, Pennsylvania currency, for the use of the state of Pennsylvania, into the treasury of the state of Pennsylvania, whereof David Rittenhouse was then treasurer, taking a bond of indemnity from the said David Rittenhouse, as treasurer as aforesaid, to save him the said George Ross, his executors, administrators, &c. harmless from the consequences of such payment which bond, is dated the first day of May, one thousand seven hundred and seventy-nine: and whereas the said George Ross dying, suit was brought against

The defendants respectfully further suggest, that the said certificates and money were received by their said testator, as the treasurer and officer of the said commonwealth, as

his executors in the court of common pleas of Lancaster county, by and on the part of the appellants before named, for the money whereunto they pretended title, by virtue of the decree aforesaid, of the court of appeals reversing the sentence of the court of admiralty, whereof the said George Ross had been judge: and whereas it does not appear that the said David Rittenhouse had any notice or information, or was in any legal way apprised of, or made a party to the said suit in the court of common pleas of Lancaster county, either in his personal capacity, or as treasurer of the state of Pennsylvania, so that judgment was obtained by default against the executors of the said George Ross, without any knowledge of the said David Rittenhouse, or his being able to take any measures on behalf of himself or the state of Pennsylvania, to prevent the same: and whereas in consequence of the judgment so obtained in the said court of common pleas of Lancaster county, against the executors of the said George Ross, the said executors brought suit against the said David Rittenhouse, which in the year one thousand seven hundred and ninety-two, in the term of April of the same year, was heard and determined in the supreme court of Pennsylvania, (on a case stated for the opinion of the court after verdict taken for the plaintiff subject to that opinion) by Thomas M'Kean, chief justice, and others, the judges of the said court, who among other things thereunto relating, did decree and determine, that the reversal as before mentioned, had and made in the court of appeals, was contrary to the provisions of the act of congress recommending the establishment of courts of admiralty, and of the general assembly of the state of Pennsylvania, in their act for the establishment of the said court, and was extrajudicial, erroneous and void, and that the court of common pleas of the county of Lancaster, was incompetent to carry into effect the decree of the court of appeals, and that the judge of the court of admiralty aforesaid, George Ross, was not liable to an action in a court of law, for distributing money according to his decree as judge of the said court: and whereas at the second session of the third congress of the United States, held at the city of Philadelphia in the month of December, one thousand seven hundred and ninety-three, it was proposed as an amendment to the constitution of the United States, that the judicial power of

appears by the bond of the said David Rittenhouse, given on the receipt thereof, filed in this court by the libellants the 22d May instant; and that the same came to their hands as

the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state, which having been adopted by the requisite number of states, as appears by the communication to congress of the then president John Adams, to this purpose, of January the eighth, one thousand seven hundred and ninety-eight, did become a part of the constitution of the United States: and whereas on the twenty-seventh day of May, one thousand eight hundred and two, the said Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clarke, by their attorney William Lewis, esquire, did file a bill in the district court of the United States, at Philadelphia, for the district of Pennsylvania, before Richard Peters, judge of the said court, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse aforesaid, deceased, for the recovery of the moneys with interest so paid into the hands of the said David Rittenhouse by Matthew Clarkson, marshal of the admiralty court aforesaid, as proceeds of the prize, the brig Active, so captured as aforesaid, and by the said David Rittenhouse and his executrixes aforesaid, formerly and still retained: and whereas in the answer of the said Elizabeth Sergeant and Esther Waters to the bill aforesaid, it sufficiently and substantially appears, that the said money was originally received by the said David Rittenhouse, and was by him detained as treasurer of the commonwealth of Pennsylvania, which commonwealth was and still is interested in, and a claimant of the same under a decree of the said George Ross, as judge of the court of admiralty in manner as herein before stated: and whereas the said Richard Peters, judge of the said district court, on the bill, answer and replication so filed by and between the said Gideon Olmstead,* Artimus White, Aquila Rumsdale and David Clarke, of the one part against Elizabeth Sergeant and Esther Waters, executrixes as aforesaid, did on the fourteenth day of January, one thousand eight hundred and three, proceed to decree as follows, viz. This is the long depending case of the sloop Active and cargo, it comes before me by libel filed against the executors of the late Mr. Rittenhouse, who received from

* *Ormstead* in the original.

his representatives after such receipt: and it being expressly insisted by the said act of the general assembly, that the said commonwealth had and has a right to the said certificates

George Ross, esquire, then judge of the state* court of admiralty, the sums mentioned in the libel, which were invested in the certificates of stock as stated therein; Mr. Rittenhouse on receiving these certificates, which were proceeds of the sales of the said sloop and cargo, gave a bond of indemnity to Mr. Ross, which is now offered when payment of these proceeds is made to be delivered up, the suit is instituted for the purpose of carrying into effect a decree of the court of appeals established under the old confederation, a copy whereof appears among the exhibits; in answer it is alleged, that the moneys were received for the state of Pennsylvania; in replication this is denied; in a memorandum made by Mr. Rittenhouse, at the foot of the account exhibited, it appears that he intended to pay over these proceeds to the state when indemnified; no such payment ever has been made, and the certificates and moneys are yet in the hands of the respondents; it appears to me, that Mr. Rittenhouse considered himself, as I conceive he was, a stakeholder, liable to pay over the deposit to those lawfully entitled thereto, his executors conceive themselves in the same predicament, and have declined paying over the said certificates and interest, no counsel have appeared and requested to be heard on the part of the respondents, and I am left to judge from the libel, answer, replication and exhibits which contain the state of the fact, if I should be thought mistaken in the opinion I form on the subject, there is time and opportunity to appeal to a superior tribunal; I throw out of the case all circumstances not immediately within my present view of the duty I have to perform; I have nothing to do with the original question that has been decided by the court of appeals, nor does it appear to me essential for me to determine with what intentions Mr. Rittenhouse received the certificates, the fact of the certificates and interests being now in the hands of the respondents, is granted by them in their answer; it has been determined by the supreme court of the United States, that this court has power to effectuate the decrees of the late court of appeals in prize causes, and this court has on several occasions practised agreeably to that decision; there is no doubt on my mind, (the authorities in the books being clear on this point) that the process and jurisdiction of this court, will reach and extend over the proceeds of all

* *State of court* in the original.

and money, and these defendants having as aforesaid obeyed the requisition of the said act, these defendants suggest that the said decree of this honourable court ought not to be executed nor any process issued thereupon against them.

ships, goods and articles, taken as lawful prize, found within the district and legally proceeded therein, these proceeds are under the same legal disposition, and subject to the same responsibility, under whatever shape they may appear, as the original thing from which they were produced; it is conceded that the certificates and moneys in question are proceeds of the sloop and cargo, in the libel mentioned, these were decreed to the libellants by the judgment of the late court of appeals: I am therefore of opinion, and accordingly decree, and finally adjudge and determine; that the certificates be transferred and delivered, and the interest moneys paid over by the respondents to the libellants, of execution in the judgment and decree of the court of appeals, as stated in the proceedings in this cause with costs; I make it however a condition that the bond of indemnity be cancelled or delivered to the respondents, on their compliance with this decree. Signed, Richard Peters. All which legal proceedings herein before stated, will more fully and at large appear, on reference to the records of the respective courts wherein the same were had: therefore it hath become necessary for the general assembly of Pennsylvania, as guardians of the rights and interests of this commonwealth, and to prevent any future infringements on the same, to declare; that the jurisdiction entertained by the court or committee of appeals over the decree of George Ross, as judge of the court of admiralty of Pennsylvania, in the suit where the claimants of the brig Active as prize were the libellants, as herein before stated, was illegally usurped and exercised in contradiction to the just rights of Pennsylvania, and the proper jurisdiction of the court of admiralty established as aforesaid, under the authority of this state, and that the reversal of the decree of the said George Ross, in that suit, was null and void, that the jurisdiction entertained by Richard Peters, judge of the district court aforesaid, in the suit of Gideon Olmstead, Artimus White, Aquila Rumsdale and David Clarke, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse, deceased, was illegally usurped and exercised, that the rights of this commonwealth as a claimant, and as the party substantially interested in the said suit, though apparent on the face of the proceedings, were un-

The defendants respectfully further suggest that the said decree of this honourable court was pronounced, so far as

fairly passed over and set aside; that the said David Rittenhouse was not and ought not to have been considered in the light of a mere stakeholder, but as the treasurer and agent of this commonwealth, and that the jurisdiction and decree of the said Richard Peters hereon, were entertained, and made in manifest opposition to, and violation of the last amendment of the constitution of the United States herein before stated, and ought not to be supported or obeyed: therefore,

Section I. *Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania, in General Assembly met, and it is hereby enacted by the authority of the same,* That the governor of this commonwealth be authorized, and he is hereby authorized and required, to direct the attorney general of this commonwealth, to apply without delay to Elizabeth Sergeant and Esther Waters, executrixes as aforesaid, and require them forthwith to pay into the treasury of this commonwealth the moneys by them admitted to have been received in respect of the premises, in their answer to the bill so as aforesaid filed against them, in the district court of Pennsylvania, before Richard Peters, judge of the said court, without regard to the decree of the said Richard Peters herein, and in default thereof by the said Elizabeth Sergeant and Esther Waters, to direct the said attorney general to bring suit in the name of the commonwealth, in the proper court of this commonwealth, against the said Elizabeth Sergeant and Esther Waters for the moneys aforesaid, and proceed as speedily as the course of legal proceedings will permit to enforce the recovery and payment thereof, into the treasury of this commonwealth.

Section II. *And be it further enacted by the authority aforesaid,* That the governor of this commonwealth be authorized and required, and he is hereby authorized and required, to protect the just rights of the state, in respect of the premises, by any further means and measures that he may deem necessary for the purpose, and also to protect the persons and properties of the said Elizabeth Sergeant and Esther Waters from any process whatever, issued out of any federal court, in consequence of their obedience, to the requisition, so as aforesaid directed to be made to them, by the attorney general of this commonwealth; and in the name of this commonwealth, to give to the said Elizabeth Sergeant and Esther Waters, a sufficient instrument of indemnification in case of their payment of the moneys aforesaid, in compliance with this act, without suit brought against them on the part of this commonwealth, for the recovery of the same.

respects the claims, rights and interests of the said commonwealth of Pennsylvania ex parte and without jurisdiction.

JOHN SERGEANT,
attorney for defendants.

After the filing of this suggestion, it does not appear that any motion was made in the district court for process against the respondents for a considerable period, altho' an intention to move for such process was frequently intimated, and on the part of the judge of the district court, there was a disposition to have the case again examined by the supreme judicial tribunal of the United States. When process was demanded by Mr. Franklin, the present attorney general of the state of Pennsylvania, who was of counsel for Mr. Olmstead, it was refused. The motives to this refusal are assigned by the district judge in his return to the mandamus issued by the supreme court of the United States enjoining him to issue process to enforce his decree, or to show cause why the same should not be awarded. This mandamus was received on the 18th of March, 1808, and the following return was made to it.

To the honourable the supreme court of the United States, the subscriber, judge of the district court of the United States, in and for the Pennsylvania district, in obedience to the writ of mandamus issued by order of the supreme court in the case of Gideon Olmsted and others libellants, against the surviving executors of the late David Rittenhouse esquire, and to the said district judge directed, begs leave to return

That the proceedings of the district court in the above cause, which are herewith transmitted and respectfully submitted, will show the grounds of the judgment by the said court rendered. Every opportunity, through the whole course of these proceedings, was given to the parties to litigate the claim or discuss questions, either on the merits or jurisdiction. Nor was any step taken without due and timely notice.

The answer of the respondents will show their objections

to the claim of the libellants. This answer refers to an act of assembly of the state of Pennsylvania, passed the twenty-sixth day of February 1801, which was not produced or brought under the legal notice of the court.

No application for execution of the decree was made, until within twelve or eighteen months past; nor has it been till more recently much pressed.

By the suggestion filed by the respondents, their objections to the execution of the decree will appear. They have made an act of assembly of the state of Pennsylvania a part of their suggestion; and thus, for the first time during the pending of the suit brought this act under the judicial notice of the court. It is entitled "An act relating to the claim of this commonwealth against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse, esquire, deceased;" passed April the second, 1803. And to this act I pray leave to refer.

This act, or any of its allegations, has no influence on my opinion. Let this opinion be erroneous or correct, a proceeding in some of its parts indecorous and in others unjustifiable, can have no operation in rectifying supposed errors or convincing my judgment. But from prudential more than other motives, I deemed it best to avoid embroiling the government of the United States and that of Pennsylvania (if the latter government should choose so to do) on a question which has rested on my single opinion, so far as it is touched by my decree. And under the influence of this sentiment, I have withheld the process required. If this be not considered a legal cause, it must be deemed a candid acknowledgment that I do not invariably obey a rigorous dictate of duty, or follow an inflexibly strict construction of law. I entertained a hope that a legislature succeeding that by which the act before mentioned was passed, would, under a more temperate view of the subject, have repealed it, and enabled and directed

the executive of the state or some other authority to put this case in a legal train of investigation. So that the final judgment and decree of the superior tribunal of the United States might have been in a proper course obtained; and thereby any erroneous opinion or decree given or made by me might have been rectified, (if any opinion or decree should have been found illegal or erroneous) in a manner more becoming the real dignity of a state, more suitable to the situation of those who execute the duties of a branch of the government of the United States, and more consistent with the good order and peace of the community. This hope was cherished by the proceedings of the legislature of Pennsylvania, in other cases wherein the state claimed interests. This expectation has been disappointed. There being no other legal mode of obtaining the decision of the superior tribunal of the United States (the only jurisdiction by which the judgments of inferior courts of the United States, can be finally rectified or judicially annulled) I have thought it proper, and under all circumstances fully justifiable, to obtain that decision by placing the case under the cognisance of your honourable court in its present form.

On the merits and justice of the claim of the libellants I have no doubt; but remain of the same opinion I have mentioned in my decree.

As to the jurisdiction.—I have never conceived that the allegations on this point contained in the act of assembly last mentioned had legal foundation. It is well known to your honourable court that third persons claiming interests in *pais* cannot by such claim constitute themselves or be judicially considered parties in suits pending in the name of others. Nor does there now exist any legal mode of interpleading or compelling states to become parties in suits in the courts of the United States. Yet if your honourable court shall be of

opinion that the objections to jurisdiction are relevant, I shall agreeably to my duty continue to withhold any farther proceeding. But if on the other hand, a peremptory direction to execute the decree shall be the consequence of your deliberations, having now the whole case before you, there can be no order or direction, which it is my legal obligation to obey, to which (impelled by a sense of justice, however I may regret the circumstance as it respects the parties, respondents, or consequences which may flow from it) I shall more cheerfully submit.

RICHARD PETERS.

July 18th, 1808.

At the February sessions, 1809, of the supreme court of the United States, held at Washington, the case of Olmsted and others *v.* Rittenhouse's executrixes, was heard on the return of the district judge to the mandamus; and the court after delivering the following opinion in writing ordered a peremptory mandamus to issue.

Olmsted and others
v.
Rittenhouse's executors.

With great attention and with serious concern the court has considered the return made by the judge for the district of Pennsylvania to the mandamus directing him to execute the sentence pronounced by him in this case, or to show cause for not so doing. The cause shown is an act of the legislature of Pennsylvania passed subsequent to the rendition of this sentence. This act authorizes and requires the governor to demand for the use of the state of Pennsylvania the money which had been decreed to Gideon Olmsted and others, and which was in the hands of the executors of David Rittenhouse, and in default of payment to direct the attorney general to institute a suit for the recovery thereof.

This act further authorizes and requires the governor to use any further means he may think necessary for the protection of what it denominates "the just rights of the state," and also to protect the persons and properties of the said executors of David Rittenhouse deceased, against any process whatever issued out of any federal court in consequence of their obedience to the requisition of the said act.

If the legislatures of the several states may at will annul the judgments of the courts of the United States and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other state, must feel a deep interest in resisting principles so destructive of the union, and in averting consequences so fatal to themselves.

The act in question does not in terms assert the universal right of the state to interpose in every case whatever, but assigns as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the union is placed by the constitution in the several state legislatures then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court of Pennsylvania over the case in which that jurisdiction was exercised ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States and Great Britain, Gideon Olmsted and other citizens of Connecticut, who say they had been carried to Jamaica as prisoners, were employed as part of the crew of the sloop Active, bound from Jamaica to New York, and laden with a cargo for the use of the British army in that place. On the voyage, they seized the vessel, confined the captain, and sailed for Egg-Harbour. In sight of that place the Active was captured by the Convention, an armed ship belonging to the state of Pennsylvania, brought into port, libelled, and condemned as prize to the captors. From this sentence, Gideon Olmsted and others, who claimed the vessel and cargo, appealed to the court of appeals established by congress; by which tribunal the sentence of condemnation was reversed; the Active and her cargo condemned as prize to the claimants, and process was directed to issue out of the court of admiralty commanding the marshal of that court to sell the said vessel and cargo, and to pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court; the judge of which admitted the general jurisdiction of the court established by congress as an appellate court, but denied its power to control the verdict of a jury, which had been rendered in favour of the captors, the officers and crew of the Convention, and therefore refused obedience to the mandate, but directed the marshal to make the sale, and after deducting charges, to bring the residue of the money into court subject to its future order.

The claimants then applied to the judges of appeals for an injunction to prohibit the marshal from paying the money arising from the sales into the court of admiralty; which was awarded and served upon him; in contempt of which, on the 4th January, 1778, he paid the money to the judge who acknowledged the receipt thereof at the foot of the marshal's return.

On the 1st May, 1779, George Ross, the judge of the court of admiralty, delivered to David Rittenhouse, who was then treasurer of the state of Pennsylvania, the sum of 11,496*l.* 9*s.* 9*d.* in loan office certificates, which was the proportion of the prize money to which that state would have been entitled, had the sentence of the court of admiralty remained in force. On the same day, David Rittenhouse executed a bond of indemnity to George Ross; in which, after reciting that the money was paid to him for the use of the state of Pennsylvania, he binds himself to repay the same should the said George Ross be thereafter compelled by due course of law to pay that sum according to the decree of the court of appeals.

These loan office certificates were in the name of Matthew Clarkson, who was marshal of the court of admiralty, and were dated the 6th November, 1778. Indents were issued on them to David Rittenhouse; and the whole principal and interest were afterwards funded by him in his own name under the act of congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memorandum made by himself at the foot of a list of the certificates mentioned above, in these words:

"Note. The above certificates will be the property of the state of Pennsylvania when the state releases me from the bond I gave in 1778 to indemnify George Ross esquire, judge of the admiralty, for paying the 50 original certificates into the treasury as the state's share of the prize."

The state did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life; and after his death they remained in possession of his representatives,

against whom the libel in this case was filed for the purpose of carrying into execution the decree of the court of appeals.

While this suit was depending, the state of Pennsylvania forbore to assert its title; and in January 1803 the court decreed in favour of the libellants; soon after which the legislature passed the act which has been stated.

It is contended that the federal courts were deprived of jurisdiction in this cause by that amendment of the constitution which exempts states from being sued in those courts by individuals. This amendment declares " that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The right of a state to assert, as plaintiff, any interest it may have in a subject which forms the matter of controversy between individuals in one of the courts of the United States is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides that no suit shall be commenced or prosecuted against a state. The state cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one state against citizens of a different state, where a state is not necessarily a defendant. In this case the suit was not instituted against the state or its treasurer, but against the executors of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure

of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a state to property in possession of an individual must arrest the proceedings of the court, and prevent their looking into the suggestion and examining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificate in question was vested in the state of Pennsylvania.

By the highest judicial authority of the nation, it has been long since decided that the court of appeals erected by congress had full authority to revise and correct the sentences of the courts of admiralty of the several states in prize causes. That question therefore is at rest. Consequently the decision of the court of appeals in this case annulled the sentence of the court of admiralty, and extinguished the interest of the state of Pennsylvania in the Active and her cargo which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it into whosesoever hands it might come. These certificates in the hands, first of Matthew Clarkson, the marshal, and afterwards of George Ross the judge of the court of admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the state of Pennsylvania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the state of Pennsylvania, it is apparent that he held them in his own right until he should be completely indemnified by the state. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the state treasury, to have been designated in any manner as the pro-

perty of the state, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents issued upon them for interest were drawn by David Rittenhouse and preserved with the original certificates. When funded as part of the debt of the United States, they were funded by David Rittenhouse; and the interest was drawn by him. The note made by himself at the foot of the list, which he preserved as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory not on the state of Pennsylvania but on David Rittenhouse in his private capacity.

These circumstances demonstrate beyond the possibility of doubt that the property, which represented the Active and her cargo, was in possession not of the state of Pennsylvania but of David Rittenhouse as an individual; after whose death it passed like other property to his representatives.

Since then the state of Pennsylvania had neither possession of nor right to the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that state, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and consequently the state of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order, which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory mandamus must be awarded.

On the 27th of February, 1809, the following message was received by the house of representatives of the state of Pennsylvania.

Message of the governor to the senate and house of representatives of the commonwealth of Pennsylvania.

" Gentlemen,

" I have received information that the supreme court of the United States hath ordered a peremptory mandamus to be issued to the suit of Gideon Olmsted and others, *v.* Elizabeth Sergeant and Esther Waters executrixes of the late Mr. Rittenhouse; and that immediate application will be made to Richard Peters, judge of the district court of Pennsylvania, for an execution against the persons and effects of Mrs. Sergeant and Mrs. Waters; or that rather, as it is an admiralty proceeding, an attachment against their persons will be the compulsory process adopted on the occasion.

" By the act of the 2d April, 1803, Mrs. Sergeant and Mrs. Waters are directed to pay a sum of money, arising out of the sale of the British sloop Active, captured during the revolutionary war, into the state treasury. With the requisitions of that law, the said executrixes have complied. It now becomes my duty, agreeable to the provisions of that act, to protect the persons and property of the said executrixes, against the said process.

" Painful as the duty is, I am compelled, and am now making arrangements to call out a portion of the militia for that service; that being the only means in the power of the executive. As the execution of this law may produce some serious difficulties, as it respects the relation between the state governments and that of the United States, I have thought it proper to make this communication; on which

the legislature can act as in their wisdom they shall think expedient.

"SIMON SNYDER.

"The honourable James Engle, esq.
speaker of the house of representatives.

"Lancaster, February 27, 1809."

Report of the committee of the Senate of the state of Pennsylvania on the foregoing message.

The committee, to whom was referred the communication from the governor, with information that the supreme court of the United States had ordered a peremptory mandamus to be issued, in the suit of Gideon Olmstead and others, *v.* Elizabeth Sergeant and Esther Waters, Executrixes of Mr. Rittenhouse, &c. REPORT:

That the British sloop Active had been captured, as prize, on the high seas, in September, 1778, and was brought into the port of Philadelphia, where she was libelled in the court of admiralty of the state, held before George Ross, esq. the then judge, on the 18th day of the same month. Gideon Olmstead, Artemas White, Aquila Rumsdale, and David Clarke, all citizens of the United States, for whose use the action was brought, claimed the whole vessel and cargo, as their exclusive prize: But Thomas Huston, master of the brig Convention, a vessel of war belonging to the state of Pennsylvania, claimed a moiety for the state, himself, and crew; and James Josiah, master of the sloop Gerard, a private vessel of war, claimed for himself, owners and crew, a fourth part; allowing a fourth to the four persons before named.

The libels were tried by a jury, on the 15th November, 1778, and a general verdict given, in the proportions above mentioned; which was confirmed by the sentence of the court.

Gideon Olmstead and the three other mariners appealed, from this sentence, to the court of appeals of the United States; which, on the 15th of December following, reversed the sentence of the judge of admiralty, and decreed the whole to the appellants.

George Ross, esq. judge of the court of admiralty, refused obedience to the decree of reversal; alleging, that the act of assembly, under which he proceeded, had forbid all reexamination, or appeal from facts found by a jury; and, the verdict of course standing in full force, he would not execute judgment, in contradiction to it: and directed the marshal of the said court to pay part of the proceeds of the said sale, to the amount of £11,496 9*s.* 9*d.* Pennsylvania currency, into the state treasury, of which David Rittenhouse was treasurer, for the use of the state of Pennsylvania; taking a bond of indemnity from the said treasurer, to save him, the said George Ross, his executors, &c. harmless.

In consequence of a suit brought, and judgment obtained, by default, against the executors of George Ross, the said executors brought suit against David Rittenhouse, which, in 1792, in April term, was heard and determined; the court decreeing that the said George Ross was not liable, in a court of law, for distributing money, according to his decree, as judge of the said court.

On the 27th day of May, 1802, the aforesaid Gideon Olmstead, and Artemas White, Aquila Rumsdale, and David Clarke, the three other mariners, by their attorney, William Lewis, did file a bill in the district court of the United States, at Philadelphia, for the district of Pennsylvania, before Richard Peters, judge of the said court, against Elizabeth Sergeant and Esther Waters, surviving executrixes of David Rittenhouse aforesaid, deceased, for the recovery of the moneys, with interest, so paid into the hands of the said Rit-

tenhouse, by Matthew Clarkson, marshal of the admiralty courts aforesaid, as proceeds of the prize sloop Active, captured as aforesaid; and, by the said David Rittenhouse and his executrixes, formerly and still retained.

And the said Richard Peters, judge of the said district court, on the bill, answer, and replication so filed by and between the said Gideon Olmstead and the three other named mariners aforesaid, of the one part, against Elizabeth Sergeant and Esther Waters, executrixes aforesaid, did, on the 14th day of January, 1803, decree, that the part of the proceeds of the said prize, belonging to the state, as never having been paid into the treasury of the state, be transferred and paid over, by the respondents, to the libellants, as stated in the proceedings of this cause, with costs; on condition that the bond of indemnity be cancelled, or delivered to the respondents, on their compliance with this said decree.

All which proceedings will more fully and at large appear, on reference to the records of the respective courts, wherein the same were had.

In consequence of which an act was passed by the legislature, April 2, 1803, authorizing and requiring the governor to direct the attorney general to apply, without delay, to Elizabeth Sergeant and Esther Waters, executrixes as aforesaid, and require them forthwith to pay, into the treasury of this commonwealth, the moneys by them admitted to be received, in respect of the premises, without regard to the decree of the said Richard Peters; and, in case of default, to enforce the same. Likewise, to protect the just rights of the state, in respect of the premises, by any further means and measures that he may deem necessary for the purpose. And also, to protect the persons and properties of the said Elizabeth Sergeant and Esther Waters, from any process whatever, issued from the federal court, in consequence of their disobedience; and, in the name of the commonwealth, to give

them a sufficient instrument of indemnification, in case of their payment of the moneys aforesaid, in compliance with the act of assembly.

After a delay of some years, the supreme court of the United States has now ordered a peremptory mandamus to be issued, in the suit of the said Gideon Olmstead and others, *versus* Elizabeth Sergeant and Esther Waters, executrixes of the late David Rittenhouse; and that immediate application will be made to Richard Peters, judge as aforesaid, for an execution against their persons and effects; or, rather, that an attachment against their persons will be the compulsory process adopted on the occasion.

After examining these proceedings, the committee were led to inquire into the causes that produced so serious a misunderstanding.

In the 9th article of the confederation of the states, it is declared, "That the United States, in congress assembled, have the sole and exclusive right and power of establishing courts, for receiving and determining finally appeals, in all cases of captures: *provided*, that no member of congress shall be appointed a judge of any of the said courts."

On the 25th November, 1775, congress passed an act, the 4th section of which is in the following words: "that it be, and hereby is, recommended to the several legislatures in the united colonies, as soon as possible to erect courts of justice, or give jurisdiction to the courts now in being, for the purpose of determining concerning the captures to be made as aforesaid: and provide that all trials, in such case, be had by a jury, under such qualifications as to the respective legislatures shall seem expedient."

The 6th section of the same act declares: "That, in all cases, an appeal shall be allowed to the congress, or to such

person or persons as they shall appoint, for the trial of appeals," &c.

An act of assembly, passed the 9th of September, 1778, entitled "An act for establishing courts of admiralty," allows appeals from that court in all cases, unless from the determination or finding of the facts by a jury, which was to be without reexamination or appeal.

On the 6th of March, 1779, the committee of congress, to whom was referred the report of the committee on appeals, of January 19, 1779, having, in pursuance of the instructions to them given, examined into the causes of the refusal of the judge of the court of admiralty, for the state of Pennsylvania, to carry into execution the decree of the court or committee of appeals, reported a state of the case.

Whereupon, congress, among other resolutions,

Resolved, That congress, or such person or persons as they may appoint, to hear and determine appeals from the courts of admiralty, have necessarily the power to examine, as well into decisions on facts as decisions on law, and to decree finally thereon; and that no finding of a jury, in any court of admiralty, or court for determining the legality of captures on the high seas, can or ought to destroy the right of appeal, and the reexamination of facts, reserved to congress.

On the 15th of January, 1780, congress resolved *(inter-alia)* "That the trials in courts of appeals should be according to the usage of nations, and not by jury."

By comparing the foregoing acts, the following questions will arise:

1. Whether the court of appeals, established by congress, and composed of members of that body, contrary to the 9th article of the confederation, was a competent tribunal to hear appeals from a state court of admiralty.

2. Whether contrary to the provisions of an act of assembly, passed in consequence of a recommendation of an act of congress, passed the 25th of November, 1775, the court of appeals had jurisdiction to investigate facts, after a trial and general verdict by a jury, and to give a contrary decision.

3. Whether, since the amendment of the constitution, prohibiting citizens from suing a state, the making an officer or agent of the state a defendant in the cause, when the state alone is interested in the event, and the real party in the suit, a state can be tricked out of her right, in this indirect way, when she could not be sued directly, and by these means the object of the amendment be defeated.

4. Whether, on a suggestion or appearance of title in a state, the court undertaking to decide on the validity of the title, would not have the same effect, if, thereby, the money of the state can be taken out of the hands of her agent, as though the constitution had not been amended.

5. Whether the illegal decision of a court of appeals can annul the sentence of a court of admiralty, so as to extinguish the interest of the state, which was acquired by that sentence. And whether the courts of the United States, since the amendment of the constitution, can decide on the legality of a decree involving a state right, or affecting the interest of the state.

To form a correct opinion, on the several points arising out of the facts brought into view, by the committee, it will be necessary to begin with the articles of confederation; which, after their adoption, contained the fundamental principles and powers granted to the continental congress. By these articles, no member of congress was to be a judge of the court of appeals. They were ratified by the state of Pennsylvania, July 9th, 1778; but they were not adopted, by all the states, till , 1781.

If these articles were not binding on congress, before their final adoption by all the states, so as to prevent congress from establishing a court of appeals, composed of their own members, yet there was a manifest impropriety in acting in contradiction of an article they had themselves proposed to the several states, for their adoption; and which, at the time of the reversal of the verdict of a jury, and the sentence of the state court of admiralty, had been ratified by Pennsylvania.

Taking, therefore, their own principles for a guide, confirmed by this state, by adopting the articles of confederation, the court of appeals, composed of members of congress, ought not to have been considered competent, on an appeal from the court of admiralty, established by Pennsylvania. But, admitting the competency of the court, on account of the articles of confederation not being binding, at that time; yet the court could not have jurisdiction, in a cause, contrary to an act of assembly of this state, passed, in pursuance of a resolve of congress, which did not allow an appeal to investigate facts, after a trial and general verdict of a jury; which were to be without reexamination or appeal.

It is true, congress exercised many powers, necessarily growing out of the crisis of affairs; and, if acquiesced in by the states, though not specially granted nor comprehended in the articles of confederation, were, notwithstanding, binding. But, where a state legislated on a subject, congress could assume no power, in contravention of an act of the legislature. Therefore, the decree of the court of appeals, reversing the sentence of the judge of the state court of admiralty, was erroneous, illegal, and void.

If the decree of the court of appeals was illegal and void, the present courts of the United States possess no power to enforce so unrighteous a decision, against the just rights of a state.

If the court of appeals, inattentive to our act of assembly, the sole ground of their jurisdiction, have exceeded their proper limits, and judged in a matter which was not cognisable by them; if the courts of the United States, exceeding their powers, undertake to coerce and enforce a decree, against the legitimate rights of the state; with a knowledge of the continued opposition of the state against this usurpation of power, and encroachment upon her independent sovereign right; ought the state now to succumb, and pave the way for future encroachments, lest she should be charged with resisting the authority of the general government?

Will the legislature tamely betray the trust confided to them, by sacrificing the rights of the state, after their predecessors had so long defended them?

These are questions that unavoidably present themselves, in the investigation of this subject. It is scarcely necessary to touch on the other points, arising out of this controversy: for, if the jurisdiction of the court did not extend to the case before them, the whole proceedings must necessarily be void. But, supposing the court competent, and their exercise of power legitimate, the interest of the state, since the amendment of the constitution of the United States, which prevents individuals from suing states, without their consent, could not be affected by a decision or decree in favour of such individuals.

In vain will it be said, that the state was not a party to the suit, as the treasurer, for a time, kept the moneys in his own hands, in consequence of the bond of indemnity he gave to the judge of the state court of admiralty: for, if the state could be thus tricked out of her right, by making her agent the defendant in the suit, when the state is the real defendant, and interested party; then would the amendment of the

constitution, which goes to prevent a state's being sued, be illusive and nugatory.

When the suit against the executors of Mr. Rittenhouse was instituted, it was evident, from the face of the papers, that he had received the money as treasurer of the state, for her use, and could not be considered a defendant, in any other character, than as an agent for the state: And, if the state cannot be sued directly, she cannot be sued through or in the name of her agent. Therefore the suit was not sustainable, on that point.

It was not necessary or proper for the state, through her attorney, to make the suggestion of interest on the record, lest it should be considered indirectly admitting the right of the court to decide on the suggestion of interest itself.

The whole proceedings, therefore, before judge Peters, as well as before chief justice *Marshall* (the state of Pennsylvania declining to appear, by her attorney, in a court that had no jurisdiction to decide on her rights) were ex parte, extrajudicial, erroneous, and void.

The resolve of congress, passed the 22d of May, 1779, "That the resolutions of congress, passed the 6th of March, 1779, relative to the control of congress, in the last resort, over all jurisdictions for decideing on the legality of captures on the high seas, be immediately transmitted to the several states; and that they be respectively requested to take effectual measures for conforming therewith," is a strong evidence, that congress themselves doubted the right of exercising the power they had assumed.

If they derived, from the law of nations, the right of deciding on appeals, in all cases of prize, why request the states to comply therewith? If the power was necessarily in congress, as the head of the nation, or in such courts of appeal as they should appoint, it either could or could not, be

controlled by the states. If it could not be controlled by the states, it was idle to request their conformity. If it could be controlled by the states, then the act of assembly, denying the right of appeal, was in full force at the adoption of the present constitution of the United States, and continues in force, as it respects adjudications under it, to this day. Therefore the present courts of the United States can possess no power to enforce a decree of the court of appeals, in contravention of that act.

Does not the resolve of congress, passed the 15th January, 1780, "That the trials in courts of appeal should be according to the usage of nations, and not by jury," imply that the power was doubtful, and the law otherwise? Or where was the necessity of passing such a resolution? It was absurd to say, that the trials in courts of appeal should be according to the usage of nations, if the law was already so established.

Besides, a general court of appeals, in the hands of the supreme power of the nation, is not so much derived from the law of nations, as the effect of treaties between the maritime powers of Europe. At least *Blackstone*, and *Lee* in his Treatise on Captures, say, the privy council, in Britain, decide ultimately in prize causes, in pursuance of treaties.

But congress could derive no power from such source, having formed no treaties, in relation thereto; nor even, when the first resolves were passed, considered as an independent nation. So that in whatever light the assumption of power, in the court of appeals is viewed, it will be found to be untenable. Indeed every step taken, in the progress of this business, tends to show, that the whole proceedings of the United States' courts were unfounded. And in this light they have always been considered by this state.

January 31, 1780, the general assembly, in consequence of a proposal in congress, "to draw an order on the treasurer

of the United States, for three fourths of the net proceeds of the sloop Active and her cargo, and to pay the same to Gideon Olmstead and other appellants in that case; in order to satisfy the decree of the court of appeals, for prizes made at sea, and that the same be charged to the state of Pennsylvania, referring said state, for indemnification, to the three fourths in the hands of the judge of the court of admiralty of Pennsylvania;" adopted the instructions given, by the last house of assembly, to a committee of said house, appointed to confer with a committee of congress, in the case of the sloop Active; and, among other things, instructed their delegates in congress to represent to that honourable body, that they would consider any application of the money of this state, to the purpose aforesaid, as an high infringement on the honour and rights of the commonwealth; and directed them to enter a protest against the same, in behalf of the state.

And further instructed them to inform congress, that they will complain, in an especial manner, of those delegations which shall concur in any vote for that purpose, to the several legislative bodies from whom they respectively derive their powers: And that, under the authority of the state laws, an order had been obtained, for distributing the three fourths given by the verdict of a jury, in the case of the sloop Active, to the captains and crews of the brigantine Convention and her consort.

It will be necessary to observe here, by way of elucidation, that the distribution was, as the committee is informed, per agreement of those concerned, after the jury had decided on the facts. Gideon Olmstead and his associates received one fourth; the masters and mariners of the other vessels received, each one fourth; and the state of Pennsylvania, as

owner of one of the vessels, received the remaining fourth of this distribution, in loan-office certificates.

From the constant opposition of the state, to the determination of congress to enforce the decree of the court of appeals, and the notoriety of the facts, the judges of the United States courts must have known, that the state was a party, and the real defendant, in the suit; and therefore should not have sustained the action. Their decision could not be satisfactory; for neither judge Peters, nor chief justice *Marshall*, pretended to go into the merits of the case, to show the propriety of the reversal of the sentence of the judge of the state court of admiralty.

It will not be necessary for the committee, to show the impropriety of the reversal, to go into a full investigation of the facts, were they in possession of all the evidence relative thereto. Enough appears upon the record, to show that the case, brought before the court of appeals, was not of that nature, as to require a decision, under the laws and usages of nations: for the question was not prize or no prize; which could only be decided according to the law of nations; and, as there might, sometimes, be error in the state courts, there was a propriety in holding appeals, on points of law. Hence the necessity, for the sake of uniformity of decision, of an appeal, in such cases and questions as come properly under the law of nations, to the court of appeals established by congress. But, when the reason ceases on which the right is claimed, then the right (such as it is) ceases with it.

The question, in the present case, was a question of fact merely, whether the master and crew of the sloop Active had given up all resistance, when the Convention and her consort came up. This was a question of fact, that a jury was most competent to decide; and, having decided this question, upon a full hearing of the evidence on the fact, their deci-

sion, by no principle of law, could be reexamined or reversed; except on a new trial, and rehearing of the evidence by another jury.

No pretence could be set up, by the court of appeals, on the ground of necessity, that the case required being decided according to the usage of nations; for there was no question of law made. The only question was a question of fact; and the jury had, and were the most competent to decide that question.

Having made this investigation, and exposition of facts, with the necessary deductions drawn therefrom, the committee submit the following resolutions:

Resolved, by the Senate and House of Representatives of the Commonwealth of Pennsylvania, &c. That, as a member of the Federal Union, the legislature of Pennsylvania acknowledges the supremacy, and will cheerfully submit to the authority, of the general government, as far as that authority is delegated by the constitution of the United States. But, whilst they yield to this authority, when exercised within constitutional limits, they trust they will not be considered as acting hostilely to the general government, when, as guardians of the state rights, they cannot permit an infringement of those rights, by an unconstitutional exercise of power in the United States courts.

Resolved, That, in a government like that of the United States, where there are powers granted to the general government, and rights reserved to the states, it is impossible, from the imperfection of language, so to define the limits of each, that difficulties should not sometimes arise, from a collision of powers: and it is to be lamented, that no provision is made, in the constitution, for determining disputes between the general and state governments, by an impartial tribunal, when such cases occur.

Resolved, That the republican principles of the state of Pennsylvania, and its attachment to the general government, will not admit of a doubt, that, in resisting the process of the marshal, in executing a writ from the federal court, the legislature is seriously impressed with the insecurity of the state rights, if the courts of the United States are permitted to give unlimited extension to their power, in deciding on those rights.

Resolved, That, from the construction the United States courts give to their powers, the harmony of the states, if they resist encroachments on their rights, will frequently be interrupted: and if, to prevent this evil, they should, on all occasions, yield to stretches of power, the reserved rights of the states will depend on the arbitrary power of the courts.

Resolved, That, should the independence of the states, as secured by the constitution, be destroyed, the liberties of the people, in so extensive a country, cannot long survive. To suffer the United States courts to decide on state rights, will, from a bias in favour of power, necessarily destroy the federal part of our government: and, whenever the government of the United States becomes consolidated, we may learn, from the history of nations, what will be the event.

To prevent the balance, between the general and state governments, from being destroyed, and the harmony of the states from being interrupted,

Resolved, That our senators in congress be instructed, and our representatives requested, to use their influence to procure an amendment to the constitution of the United States, that an impartial tribunal may be established, to determine disputes between the general and state governments; and, that they be further instructed to use their endeavours, that, in the meanwhile, such arrangements may be made, between

the government of the union and of this state, as will put an end to existing difficulties.

Resolved, That the governor be requested to transmit a copy of these resolutions, together with the foregoing statement, to the executive of the United States, to be laid before congress, at their next session: and that he be authorized and directed to correspond with the president, on the subject in controversy, and to agree to such arrangements as may be in the power of the executive to make, or that congress may make, either by the appointment of commissioners or otherwise, for settling the difficulties between the two governments.

In the house of representatives of this state, a report of the committee on the message of the governor has been made, and to the same purpose with that of the report in the senate. Resistance to the decision of the supreme court of the United States is in effect the object of the reports, in both branches of the legislature. We have not received this report or we should insert it.